(13)

No. 97-2045

Supreme Court, U.S.
FILED
NOV 13 1998
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*,
Petitioners,

v.

STATE OF ALABAMA AND
STATE DEPARTMENT OF REVENUE,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

JOINT APPENDIX

MARK L. EVANS *
HENK BRANDS
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

DAVID J. BOWLING
COURTNEY HYERS
CSX TRANSPORTATION, INC.
One James Center
901 East Cary Street
Richmond, Virginia 23219
(804) 782-1495
Counsel for Petitioners

* Counsel of Record

BILL PRYOR
Attorney General
RON BOWDEN
Assistant Attorney General
DAN E. SCHMAELING
Assistant Attorney General
STATE OF ALABAMA
P.O. Box 320001
Montgomery, Alabama 36132
(334) 242-9690

CHARLES J. COOPER *
COOPER, CARVIN &
ROSENTHAL, P.L.L.C.
2000 K Street, N.W.
Suite 401
Washington, D.C. 20006
(202) 822-8960
Counsel for Respondents

(Additional counsel listed on inside cover)

PETITION FOR A WRIT OF CERTIORARI FILED JUNE 18, 1998
CERTIORARI GRANTED SEPTEMBER 29, 1998

183 pp

WALTER HELLERSTEIN
University of Georgia
Law School
Herty Drive
Athens, Georgia 30602
(706) 542-5175

CHARLES R. MORGAN
MARK D. HALLENBECK
ALBERT G. MOORE, JR.
RICHARD W. BELL
BELLSOUTH CORPORATION
Legal Department, Suite 1800
1155 Peachtree Street, NE
Atlanta, Georgia 30309
(404) 249-2726

WALTER R. BYARS
STEINER, CRUM & BAKER
Post Office Box 668
Montgomery, Alabama 36101
(334) 832-8800
Counsel for Petitioners

TABLE OF CONTENTS

	Page
Relevant docket entries:	
(Ala. Sup. Ct.)	1
(Montgomery County Cir. Ct.)	3
Order Placing Case on Administrative Docket, No. CV-89-2600-G (Montgomery County Cir. Ct., filed Jan. 23, 1990)	24
Motion To Amend State's Motion To Consolidate and Motion To Stay (filed Feb. 8, 1991)	25
State of Alabama's Answer to Interrogatories, No. CV-89-2600-G and consolidated cases (filed Aug. 22, 1991)	31
Order transferring case from administrative docket to regular docket, Nos. CV-89-2600-G & CV-90-1591-G (Montgomery County Cir. Ct., filed Oct. 17, 1991)	35
Deposition of Ernest J. Broadhead (Jan. 19, 1993) (excerpts) & Exh. 17 (excerpt)	36
Affidavit of Adele Howell Shepherd (Jan. 29, 1993) (excluding exhibits)	43
Affidavit of Larry E. Richards, Ph.D. (including Exh. A)	62
Affidavit of Wayne White (Jan. 30, 1993) (excluding exhibit)	73
Transcript of Proceedings (Dec. 14, 1994):	
Direct Examination of Ernest Broadhead (excerpts)	81
Cross-Examination of Ernest Broadhead (excerpts)	91
Redirect Examination of Ernest Broadhead (excerpt)	97
Recross-Examination of Ernest Broadhead	98
Further Redirect Examination of Ernest Broadhead	98
Direct Examination of Adele Howell Shepherd (excerpt)	98

TABLE OF CONTENTS—Continued

Page

Cross-Examination of Adele Howell Shepherd (excerpts) 101

Recross-Examination of Adele Howell Shepherd (excerpt) 105

Cross-Examination of James D. Hanford (excerpt) 105

Redirect Examination of James D. Hanford 107

Cross-Examination of Ernest Broadhead (excerpt) 107

Recross-Examination of Ernest Broadhead (excerpt) 109

Testimony of Wayne White (excerpt) 110

Recross-Examination of Larry Richards (excerpt) 111

Cross-Examination of Ernest Broadhead (excerpt) 111

Notice of transfer of joint appeal to Supreme Court of Alabama, Nos. CV-89-2600-G *et al.* (filed Jan. 16, 1997) 113

Plaintiffs' Trial Exhibits:

Exh. 1 (Larry E. Richards, *A Study of the Differences in the Franchise Tax Liability for Foreign vs. Domestic Corporations: Alabama 1988-1991*) (excluding appendices) 114

Exh. 3:

Taxpayer's First Set of Interrogatories, Requests for Production and Requests for Admissions to Commissioner and Department, No. CV-90-2555-G and consolidated cases (filed June 24, 1991) 137

State of Alabama Department of Revenue's Response to Requests for Admissions, No. CV-90-2555-G and consolidated cases (filed July 29, 1991) 152

TABLE OF CONTENTS—Continued

Page

Taxpayers' First Set of Interrogatories, Requests for Production and Requests for Admissions to Commissioner and Department, No. CV-89-2600-G and consolidated cases (filed June 24, 1991) 155

State of Alabama Department of Revenue's Response to Requests for Admissions, No. CV-89-2600-G and consolidated cases (filed July 29, 1991) 173

Exh. 7 176

Exh. 8 177

IN THE SUPREME COURT OF ALABAMA

Case Number 1960591

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*

v.

STATE OF ALABAMA AND
STATE DEPARTMENT OF REVENUE

Montgomery County Cir. Ct. No.: CV-89-2600, 90-1591, 90-1711, 91-397, 91-1079, 90-2555, 90-2556, 90-2557, 90-2558, 91-2151

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
010297	Motion of aplt for transfer of joint appeal challenging Alabama Franchise Tax Scheme from the Alabama Court of Civil Appeals to the Supreme Court of Alabama pursuant to Code of Alabama 1975, Section 12-3-15.
011497	Appellants' motion to transfer joint appeal to the Supreme Court of Alabama is granted.
011497	Filed with Clerk of the Supreme Court.
011597	Docketed by RBN/JCD. $100 Docket fee rec'd in Court of Civil Appeals. In forma pauperis?N
010297	Notice of appeal filed in trial court.
010397	Docketing statement filed.
012197	Docketing statement filed.
013097	Clerk's record completed; certificate filed 020397

DATE	PROCEEDINGS
022697	Record on appeal completed; certificate filed 022797
040997	Aplt. brf.filed (10) copy(s) m (Byars, Hellerstein)
040997	Appendix to Aplt. brf.filed (10) copy(s) m (Byars, Hellerstein)
040997	[Oral argument] Requested by Aplt.
042597	Aple. brf.filed (10) copy(s) m (Pryor, Bowden, Schmaeling)
052097	Aplt. reply brf.filed (10) copy(s) m
053097	Record on appeal filed w/Sup.Ct. - Tot.vols. 14
061997	[Oral argument] Denied
061997	Submitted on brfs.in lieu of oral argument.
032098	Judgment AFFIRMED - NO OPINION
032098	No Opinion, pursuant to Rule 53, ARAP, by PER CURIAM Concurrences: Hooper, CJ., Almon, Shores and Houston, JJ., concur; Maddox, J., concurs specially; Kennedy, Cook, Butts and See, JJ., dissent. (17pp.)
040798	Certificate of Judgment Issued

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

CASE: CV 89-2600
(and consolidated cases CV 90-1591,
CV 90-1711, CV 91-397 & CV 91-1079)

SOUTH CENTRAL BELL TELEPHONE CO., *et al.*

v.

STATE DEPARTMENT OF REVENUE

CASE: CV 90-2555
(and consolidated cases CV 90-2556,
CV 90-2557, CV 90-2558, CV 91-2151)

CSX TRANSPORTATION, INC.

v.

STATE DEPARTMENT OF REVENUE

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
	CASE: CV 89-2600
1/12/90	Complaint fld. Atty stated deft will accept service
1/23/90	Order placing case on admin docket.
10/30/90	Answer fld by Deft
11/9/90	Defts Mot to Consolidate CV-89-2600 w/CV-89-2252; CV-89-2253; CV-89-2254; CV-89-2475; CV-89-2511; CV-89-2510; CV-89-2586; CV-89-2600; CV-89-2601; CV-89-2602; CV-90-846; CV-90-856; CV-90-858; CV-90-859; CV-90-860; CV-90-911; CV-90-914; CV-90-915; CV-90-916; CV-90-917;

DATE	PROCEEDINGS
	CV-90-917; CV-90-912; CV-90-957; CV-90-958; CV-90-959; CV-90-960; CV-90-961; CV-90-962; CV-90-982; CV-90-1590 & CV-90-1711 fld.
11/16/90	Pltfs Mot to Consolidate CV-89-2600 w/CV-90-1591 & CV-90-1711 fld.
V	Pltfs Opposition to Consolidation fld.
2/19/91	Amend. to Complaint & Petition for Judicial review, Pursuant to 41-22-20, Code of Al 1975
3/25/91	Defts Amended Answer fld.
6/5/91	Defts Mot for Order Consolidating Cases fld w/ CV-91-1079; CV-90-1591; CV-90-1711 and CV-89-2600 fld.
6/24/91	Pltfs Amended Mot. for Order Consolidating Cases fld.
V	Consolidated Discovery—Interrog's, Req. for Prod. & Req. for Admissions by Taxpayers fld.
7/8/91	Order *granting* consolidation of CV-89-2600-G; CV-90-1591-G; CV-90-1711-G; CV-91-397-G and CV-91-1079-TH fld.
7/29/91	Deft. Response To Request for Admissions
8/22/91	Brief In Support of MSJ & Mot. for Partial Summary Judg fld.
8/22/91	Deft. Answer To Interrogatories
8/22/91	Deft. Motion For Summary Judgment
6/24/92	Ordered that this case is removed from administrative docket of this court and restored to the active docket.
2/1/93	Taxpayers' BellSouth Telecommunications, Inc. et al Response To Motion For Summary Judgment.
2/1/95	Taxpayers BellSouth Telecommunications, Inc., South Central Bell Telephone Co., BellSouth Corp., BellSouth Services Inc., BellSouth Financial Services Corp., BellSouth Advertising & Publishing Corp. BellSouth Resources Inc. BellSouth Products, Inc. Ala. Cellular Services Inc., Sunlink Corp & TechSouth Inc. (Bell Companies and CSX Trans Response to MSJ.

DATE	PROCEEDINGS
2/4/93	Amendment to Taxpayers' Response to MSJ
2/16/93	Taxpayer CSX Transp. Stipulated Facts
7/15/93	Deft Supplemental Brief In Support of Motion For Summary Judgment and Motion For Partial Summary Judgment
7/15/93	Amendment to Motion for Summary Judgment Deft. fld.
7/30/93	Deft. Dept. of Revenue Second Amended Answer
7/30/93	St. of AL Dept of Revenue Second Amendment to MSJ
7/30/93	" " " " Second Supplemental Brief In Support of MSJ and Motion For Partial Summary Judgment.
8/6/93	Taxpayers BellSouth Telecommunications Inc., South Central Bell Telephone Co., BellSouth Corp., BellSouth Services, Inc., BellSouth Fniancial Service Corp., BellSouth Advertising & Publishing Corp., BellSouth Resources, Inc., BellSouth Products, Inc., Ala. Cellular Services, Inc., Sunlink Corp and TechSouth Inc. (Bell Companies) and CSX Transportation Inc. Response to Amendments to Motion For Summary Judgment and Supplemental Briefs.
9/20/93	Second Amendment to Complaint & Petition for Judicial Review Pursuant to 41-22-20 Code of Alabama 1975.
10/1/93	Ordered These cases are placed on the administrative docket of this Court: Trial set on 8/1/94.
10/15/93	Answer to Second Amendment to Complaint fld.

DATE	PROCEEDINGS
5/17/94	Motion to w/d & substitute stipulated facts by Joint Amendment to Taxpayer Resp. to amendments to Motion for Sum. Jdgt with conditional affidavit of Richards & a Study; Stipulated Facts fld by Taxpayer.
5/17/94	Brief of pltff, taxpayer fld
5/25/94	Third Supplemental Brief in Support of MSJ and Motion for Partial Summary Judgment fld.
12/19/94	Post-Trial Supplemental Brief of Pltfs/Taxpayers fld.
12/3/96	ORDER—Consistent with the Court's opinion in the REYNOLDS litigation, the Court would hold that the relief to be afforded the Taxpayers in this case is prospective only, and the Court merely notes that there are forms of relief to cure a constitutional violation in tax cases of this nature other than ordering a refund. Because the Court has held that this action is barred by res judicata and the application of that doctrine does not violate the Taxpayer's equal protection rights under the Fourteenth amendment of the United States Constitution, it is ORDERED that the Taxpayer's claims are dismissed, and the costs of this action are taxed against the Taxpayers. DONE and ORDERED this 3rd day of December, 1996. /s/ William Gordon, CIrcuit Judge.
1/2/97	NOTICE OF APPEAL, SECURITY FOR COSTS, DESIGNATION OF RECORD FILED W/$100 DOCKET FEE
1/30/97	CERTIFICATE OF COMPLETION OF CLERK'S RECORD MAILED TO SUPREME COURT & ATTYS.

DATE	PROCEEDINGS
	CASE: CV 90-1591
8/13/90	Complaint fld.
8/28/90	Pltf. Amendment To Complaint For Declaratory Judgment and Refund of Taxes Paid Under Protest.
9/19/90	Defts. Answer fld
11/9/90	Defts Mot. to Consolidate CV-90-1591 w/CV-89-2252; 2253; 2254; 2475; 2511; 2510; 2586; 2600; 2601; 2602; CV-90-846; 856; 858; 859; 860; 911; 914; 915; 916; 917; 912; 957; 958; 959; 960; 961; 962; 982 & 1711 fld.
11/16/90	Pltfs Opposition to Consolidation fld.
√	Pltfs Mot. for Order Consolidating Cases CV-89-2600; CV-90-1591 & CV-90-1711 fld
11/28/90	Order consolidating CV-90-1591 w/CV-89-2600 & CV-90-1711 fld. & sched. conf. set for 12/14/90 at 8:30 a.m.
1/4/91	Defts Mot. to Amend Mot. to Consolidate fld.
2/19/91	Amend. to Complaint for Declaratory Judg. & refund of Taxes Paid Under Protest fld
3/25/91	Defts Amended Answer fld.
6/5/91	Pltfs Mot. for Order Consolidating Cases w/CV-89-2600; CV-91-1079; CV-90-1591 and CV-90-1711 fld.
6/24/91	Pltfs Amended Mot. for Order Consolidating Cases fld.
√	Consolidated Discovery—Interrog's, Requests for Prod. & Requests for Admissions by taxpayers fld.
7/8/91	Order consolidating CV-89-2600-G; CV-90-1591-G; CV-90-1711-C; CV-91-397-G and CV-91-1079-TH.
10/17/91	Order transferring case from administrative docket to the regular docket

DATE	PROCEEDINGS
6/24/92	Ordered that this Case is removed from the Administrative docket of this Court and restored to the active docket.
1/13/93	Petitioners, BellSouth Corp, BellSouth Services Inc., BellSouth Financial Servcies Corp, BellSouth Adv. & Publ. Co., BellSouth Resources Inc., Ala. Cellular Services Inc., Sunlink Inc & TechSouth Inc. Third Amendment to Complaint for Declaratory Judgment and Refund of Taxes Paid under Protest.
1/28/93	Defts. Answer to Third Amendment to Complaint
2/1/93	Taxpayers, BellSouth Telecommunications Inc., South Central Bell Telephone Co. BellSouth Corp., BellSouth Services Inc., BellSouth Financial Services Corp., BellSouth Advertising & Publishing Corp., BellSouth Resources, Inc. BellSouth Products, Inc. AL Cellular Services, Sunlink Corp. & Tecsouth Inc. (Bell Companies and CSX Transportation Inc. Response to Motion For Summary Judgment.
2/4/93	Amendment To Taxpayers' Response To MSJ
2/16/93	Taxpayers CSX Trans. Stipulated Facts.
7/30/93	Deft. Dept. of Revenue Second Amended Answer
7/30/93	" " " " Second Amendment to MSJ
7/30/93	" " " " Second Supplemental Brief In Support of MSJ & Motion For Partial Summary Judgment.
8/6/93	Taxpayers' Response To Amendment To Motion For Summary Judgment and Supplemental Briefs.
9/20/93	Pltf. Fourth Amendment to Complaint For Declaratory Judgment And Refund of Taxes Paid Under Protest

DATE	PROCEEDINGS
10/1/93	Ordered these cases are placed on the administrative docket of this Court; Trial on these consolidated cases set on 8/1/94
5/25/94	Third Supplemental Brief in Support of MSJ and Motion for Partial Summary Judgment fld.
12/19/94	Post-Trial Supplemental Brief of Pltfs/Taxpayers fld.
12/3/96	ORDER—Consistent with the Court's opinion in the REYNOLDS litigation, the Court would hold that the relief to be afforded the Taxpayers in this case is prospective only, and the Court merely notes that there are forms of relief to cure a constitutional violation in tax cases of this nature other than ordering a refunds. Because the Court has held that this action is barred by res juricata and the application of that doctrine does not violate the Taxpayer's equal protection under the Fourteenth Amendment of the United States Constitution, it is ORDERED that the Taxpayer's claims are dismissed, and the costs of this action are taxed against the Taxpayers. DONE AND ORDERED this 3rd day of December, 1996 /s/ William Gordon, Circuit Judge.
1/2/97	NOTICE OF APPEAL, SECURITY FOR COSTS, DESIGNATION OF RECORD W/100 DOCKET FEE
1/30/97	CERTIFICATE OF COMPLETION OF CLERKS RECORD MAILED TO SUPREME COURT & ATTYS.

CASE: CV 90-2555

12/13/90	Complaint fld.
12/13/90	Cost & supersedeas bond filed & approved.

DATE	PROCEEDINGS
1/8/91	CSX Transportation, Inc. Motion For Order Consolidating Cases
1/11/90	ORDERED, plaintiff's motion to consolidate cases no. CV-90-2556-M, CV-90-2557-PH and CV-90-2558 with the above styled case is granted. It is further ORDERED that a scheduling conference is set in these case numbers *by conference call* on February 8, 1991 at 8:30 a.m. DONE and ORDERED in chambers this 11th day of January, 1991. /s/ William Gordon, Circuit Judge.
1/14/91	Answer fld by deft.
6/24/91	Pltf. Consolidated Discovery—Interrogatories, Request For Production And Requests For Admissions By Taxpayer, Taxpayer's First set of Interrogatories, Request For Production And Requests For admissions To Commissioner and Dept.
7/29/91	Deft. Response To Request For Admissions
1/13/93	Petitioner CSX Transp., Amendment to Complaint and Petition for Judicial Review Pursuant to S41-22-20, Code of Alabama 1975
1/28/93	Respondents/Appellees Answer To Amendment To Complaint.
2/1/93	Taxpayers et al Response to Motion for Summary Judgment.
2/4/93	Amendment to Taxpayers' Response to Motion Summary Judgment.
2/16/93	Taxpayer CSX Transp. Stipulated Facts.
7/30/93	Deft Dept of Revenue Second Amended Answer
7/30/93	" " " " Second Amendment to MSJ
7/30/93	" " " " Second Supplemental Brief in Support of MSJ and Motion for Partial Summary Judgment

DATE	PROCEEDINGS
8/6/93	Taxpayer's Response to Amendments to Motion for Summary Judgment & Supplemental Briefs.
9/20/93	Second Amendment to Complaint & Petition for Judicial Review Pursuant to 41-22-20 Code of Ala. 1975, fld.
10/1/93	Ordered that these cases are placed on the Administrative docket of this Court; Trial set 8/1/94
10/15/93	Answer to Second Amendment to Complaint fld.
5/25/94	Third Supplemental Brief in Support of MSJ and Motion for Partial Summary Judgment fld.
12/19/94	Post Trial Supplemental Brief of Pltfs/Taxpayers fld
12/3/96	ORDER—Consistent with the Court's opinion would hold that the relief to be afforded the Taxpayer's in this case is prospective only, and the Court of this nature other than ordering a refund. Because the Court has held that this action is barred by res juricata and the application of that doctrine does not violate the Taxpayer's equal protection under the Fourteenth Amndment of the United States Constitution, it is ORDERED that the Taxpayer's claims are dismissed, and the costs of this action are taxed to the Taxpayers. DONE and ORDERED this 3rd day of December, 1996. /s/ William Gordon, Circuit Judge.
1/2/97	NOTICE OF APPEAL, SECURITY FOR COSTS, DESIGNATION OF RECORD W/100 DOCKET FEE
1/30/97	CERTIFICATE OF COMPLETION OF CLERKS RECORD MAILED TO SUPREME COURT & ATTYS.

DATE	PROCEEDINGS
	CASE: CV 90-2556
12/13/90	Complaint fld.
12/13/90	Cost Bond, Supersedeas bond fld & approved.
1/8/91	CSX Transportation, Inc. Motion for Order Consolidating Cases
1/11/91	Deft. Answer Fld.
6/24/91	Consolidated Discovery, Interrogatories, Requests for Production and Requests for Admissions by Taxpayers; Taxpayer's First Set of Interrogatories, Request for Production and Requests for Admissions to Commissioner and Dept.
11/27/91	CSX Transportation Inc. Motion for Order Consolidating Cases w/CV-91-2151-G, 90-2555-G, 90-2557-G and 90-2558-G.
1/13/93	Petitioner CSX Transp. Inc. Amendment to Complaint and Petition for Judicial Review Pursuant to S 41-22-20, Code of Alabama 1975.
1/28/93	Stan McDonald & Dept of Revenue Answer to Amendment to Complaint.
2/1/93	*Taxpayer* et al Response to MSJ
2/4/93	Amendment to *Taxpayers'* Response to Motion for Summary Judgment.
2/16/93	Taxpayers CSX Transp. Stipulated Facts
7/30/93	Deft. Dept. of Revenue Second Amended Answer
7/30/93	" " " " Second Amendment to Motion for Summary Judgment
7/30/93	" " " " Second Supplemental Brief in Support of MSJ and Motion for Partial Summary Judgment.
8/6/93	Taxpayers' Response to Amendments to Motion for Summary Judgment & Supplemental Brief. Denied 8/25/93

DATE	PROCEEDINGS
9/20/93	Second Amendment to Complaint & Petition for Judicial Review Pursuant to 41-22-20, Code of Alabama 1975 fld.
10/1/93	Ordered that these cases are placed on the Administrative docket of this Court; Trial set on 8/1/94
10/15/93	Answer to Second Amendment to Complaint fld.
5/25/94	Third Supplemental Brief in Support of MSJ and Motion for Partial Summary Judgment fld.
12/19/94	Post Trial Supplemental Brief of Pltfs/Taxpayers fld.
12/3/96	ORDER—Consistent with the Court's opinion in the REYNOLDS litigation, the Court would hold that the relief to be afforded the Taxpayers in this case is prospective only, and the Court merely notes that there are forms of relief to cure a constitutional violation in tax cases of this nature other than ordering a refund. Because the Court has held that this action is barred by res juricata and the application of that doctrine does not violate the Taxpayer's equal protection under the Fourteenth Amendment of the United States Constitution, it is ORDERED that the Taxpayer's claims are dismissed, and the costs of this action are taxed against the Taxpayers. DONE and ORDERED this 3rd day of December, 1996. /s/ William Gordon, Circuit Judge.
1/2/97	NOTICE OF APPEAL, SECURITY FOR COSTS, DESIGNATION OF RECORD W/100 DOCKET FEE
1/30/97	CERTIFICATE OF COMPLETION OF CLERKS RECORD MAILED TO SUPREME COURT & ATTYS.

DATE	PROCEEDINGS
	CASE: CV 90-2557
12/13/90	Complaint fld.
1/8/90	CSX Transportation, Inc. Motion for Order Consolidating Cases
1/14/91	Answer fld by defts
11/27/91	CSX Transportation Inc. Motion for Order Consolidating Cases w/CV-90-2151-G, CV-90-2555-G, CV90-2556 and 90-2558—(Granted 11/27/91)
1/13/93	Petitioner CSX Trans. Inc. Second Amendment to Complaint and Petition for Judicial Review Pursuant to S 41-22-20, Code of Alabama 1975, and or Petition for Writ of Mandamus
1/28/93	Stan McDonald and Dept. of Rev. Answer to Second Amendment to Complaint.
2/1/93	Taxpayers et al Response to MSJ.
2/4/93	Amendment to Taxpayers' Response to MSJ
2/16/93	Taxpayers CSX Transp. Stipulated Facts.
7/30/93	Deft. Dept of Revenue Second Amended Answer.
7/30/93	" " " " Second Amendment to MSJ
7/30/93	" " " " Second Supplemental Brief in Support of MSJ & Motion for Partial Summary Judgment.
8/6/93	Taxpayers' Response to Amendments to Motion for Summary Judgment and Supplemental Briefs. Denied 8/25/93
9/20/93	Third Amendment to Complaint & Petition for Judicial Review Pursuant to 41-22-20 Code of Ala 1975 &/or Petition for Writ of Mandamus.
10/1/94	Ordered that these are placed on the administration docket of this Court; 8/1/94
10/15/93	Answer to Third Amendment to Complaint fld.

DATE	PROCEEDINGS
5/25/94	Third Supplemental Brief in Support of MSJ and Motion for Partial Summary Judgment fld
12/19/94	Post Trial Supplemental Brief of Pltfs/Taxpayers fld
12/3/96	Order—Consistent with the Court's opinion in the REYNOLDS litigation, the Court would hold that the relief to be afforded the Taxpayers in this case is prospective only, and the Court merely notes that there are forms of relief to cure a constitutional violation in tax cases of this nature other than ordering a refund. Because the Court has held that this action is barred by res juricata and the application of that doctrine does not violate the Taxpayer's equal protection rights under the Fourteenth Amendment of the United States Constitution, it is ORDERED that the Taxpayer's claims are dismissed, and the costs of this action are taxed against the Taxpayers. DONE and ORDERED this 3rd day of December, 1996. /s/ William Gordon, Circuit Judge.
1/2/97	NOTICE OF APPEAL, SECURITY FOR COSTS, DESIGNATION OF RECORD W/100 DOCKET FEE
1/30/97	CERTIFICATE OF COMPLETION OF CLERKS RECORD MAILED TO SUPREME COURT & ATTYS
	CASE: CV 90-2558
12/13/90	Complaint fld.
1/8/91	CSX Transportation, Inc. Motion for Order Consolidating Cases

DATE	PROCEEDINGS
1/10/91	Defts. Answer
11/27/91	CSX Transportation Motion for Order Consolidating Cases with CV-91-2151-G, CV-90-2555-G, CV-90-2556, 90-2557-G (Granted 11/27/91)
1/13/93	Petitioner CSX Transp. Inc. Second Amendment to Complaint and Petition for Judicial Review Pursuant to S41-22-20, Code of Alabama 1975, and or Petition for Writ of Mandamus
1/28/93	Respondent/appellees answers to second amendment to Complaint.
2/1/93	Taxpayers et al Response to MSJ.
2/4/93	Amendment to Taxpayers' Response to Motion for Summary Judg.
2/16/93	Taxpayers CSX Transp. Stipulated Facts.
8/6/93	Taxpayers' Response to Amendment to Motion for Summary Judgment and Supplemental Briefs.
9/20/93	Third Amendment to Complaint & Petition for Judicial Review Pursuant to 41-22-20, Code of Ala 1975 and/or Petition for Writ of Mandamus.
10/1/93	Ordered that these cases are placed on the administrative docket of this Court; Trial set 8/1/94
10/15/93	Answer to Third Amendment to Complaint fld
5/25/94	Third Supplemental Brief in Support of MSJ and Motion for Partial Summary Judgment fld.
12/19/94	Post Trial Supplemental Brief of Pltfs/Taxpayers
12/3/96	ORDER—Consistent with the Court's opinion in the REYNOLDS litigation, the Court would hold that the relief to be afforded the Taxpayers in this case is prospective only, and the Court merely notes that there are forms of relief to cure a constitutional violation in tax cases of this nature other than ordering a tax refund.

DATE	PROCEEDINGS
	Because the Court has held this action is barred by res juricata and the application of that doctrine does not violate the Taxpayer's equal protection rights under the Fourteenth Amendment of the United States Constitution, it is ORDERED that the Taxpayer's claims are dismissed, and the costs of this action are taxed against the Taxpayers. DONE and ORDERED this 3rd day of December, 1996. /s/ William Gordon, Circuit Judge.
1/2/97	NOTICE OF APPEAL, SECURITY FOR COSTS, DESIGNATION OF RECORD W/100 DOCKET FEE
1/30/97	CERTIFICATE OF COMPLETION OF CLERKS RECORD MAILED TO SUPREME COURT & ATTYS.

CASE: CV 90-1711

9/21/90	Complaint filed with acceptance of service fld by A. G. & dept of revenue
11/1/90	St. of Al deft. Answer fld.
11/9/90	Defts Mot. to consolidate CV-90-1711 w/CV-89-2252; 2253; 2254; 2475; 2511; 2510; 2586; 2600; 2601; 2602; CV-90-846; 856; 858; 859; 860; 911; 914; 915; 916; 917; 912; 957; 958; 959; 960; 961; 962; 982 & 1591 fld.
11/16/90	Pltfs opposition to consolidation fld.
√	" Mot for Order Consolidating Cases CV-89-2600 w/CV-90-1591 & CV-90-1711
11/28/90	Order consolidating CV-89-2600 w/CV-90-1591 & CV-90-1711 fld.
2/19/91	Amend. to Complaint & Petition for Judicial Review pursuant to etc.

DATE	PROCEEDINGS
3/25/91	Deft Amended answer fld.
6/5/91	Defts Mot. for Order Consolidating Cases CV-89-2600; CV-90-1591; CV-90-1711 and CV-91-1079 fld
6/24/91	Pltfs Amended Mot. for Order consolidating cases fld.
√	Consolidated Discovery—Interrog's Reg. for Prod. & Reg. for Admissions by taxpayers fld.
7/8/91	Order consolidating CV-89-2600-G; CV-90-1591-G; CV-90-1711-G; CV-91-397 and CV-91-1079 fld.
2/16/93	Taxpayers CSX Transportation stipulated facts.
7/30/93	Deft. Dept of Revenue Second Amended answer
7/30/93	" " " " Second Amendment to MSJ
7/30/93	" " " " Second Supplemental Brief In Support of MSJ & Motion for Partial Summary Judgment
8/6/93	Taxpay's Response to amendment to Motion for Summary Judgment and Supplemental Brief Denied 8/25/93
9/20/93	Second Amendment to Complaint & Petition for Judicial Review pursuant to 41-22-20 Code of Alabama 1975.
10/1/93	Ordered that these cases are placed on administrative docket of; Trial on these consolidated cases is set for trial 8/1/94
10/15/93	Answer to Second Amendment to Complaint fld
5/25/94	Third Supplemental Brief in Support of MSJ and Motion for Partial Summary Judgment fld.
12/19/94	Post Trial Supplemental Brief of Pltfs/Taxpayers fld. by Pltfs.
12/3/96	ORDER—Consistent with the Court's Opinion in the REYNOLDS litigation, the Court would hold that the relief to be afforded the Taxpayers in this

DATE	PROCEEDINGS
	case is prospective only, and the Court merely notes that there are forms of relief to cure a constitutional violation in tax cases of this nature other that ordering a refund. Because the Court has held that this action is barred by res juricata and the application of that doctrine does not violate the Taxpayer's equal protection rights under the Fourteenth Amendment of the United States Constitution, it is ORDERED that the Taxpayer's claims are dismissed, and the costs of this action are taxed against the Taxpayers. DONE and ORDERED this 3rd day of December, 1996. /s/ William Gordon, Circuit Judge.
1/2/97	NOTICE OF APPEAL, SECURITY FOR COSTS, DESIGNATION OF RECORD FILED W/$100 DOCKET FEE
1/30/97	CERTIFICATE OF COMPLETION OF CLERKS RECORD MAILED TO SUPREME COURT & ATTYS.

CASE: CV 91-397

2/15/91	Complaint fld.
3/25/91	Defts. Answer fld.
4/17/91	Deft. James M. Sizemore Jr. & Dept of Revenue answer
6/24/91	Taxpayers Consolidated Discovery—Interrog's, Reg. for Prod. & Reg's for admissions by taxpayers fld. Pltfs Amended Mot. for Order Consolidating Cases fld.

DATE	PROCEEDINGS
7/8/91	Order consolidating CV-89-2600-G; CV-90-1591-G; CV-90-1711-G; CV-91-397-G and CV-91-1079-TH fld.
5/28/92	Order consolidating cases CV-90-2555; CV-90-2556; CV-90-2557; CV-90-2558; CV-91-2151
1/13/93	Petitioner S. C. Bell Tele. Co. Amendment to Complaint and Petition for Judicial Review Pursuant to S 41-22-20, Code of Alabama 1975, and/or Petition for Writ of Mandamus.
1/28/93	Stan McDonald and Dept of Rev. Answer to Amendment to Complaint.
2/1/93	Taxpayers et al. Response to Motion for Summary Judgment.
2/4/93	Amendment to Taxpayers' Response to MSJ
7/30/93	Deft. Dept of Revenue Second Amended Answer
7/30/93	" " " " Second Amendment to MSJ
7/30/93	" " " " Second Supplemental Brief In Support of MSJ & Motion for Partial Summary Judgment.
8/6/93	Taxpayers' Response to Amendment to Motion for Summary Judgment and Supplemental Brief. Denied 8/25/93
9/20/93	Second Amendment to Complaint & Petition for Judicial Review Pursuant to 41-22-20, Code of Alabama, 1975 and/or Petition for Writ of Mandamus.
10/1/93	Ordered that these cases are placed on administrative docket; Trial set 8/1/94
10/15/93	Answer to Second Amendment to Complaint fld.
5/25/94	Third Supplemental Brief in Support of MSJ and Motion for Partial Summary Judgment fld.
12/19/94	Pltfs Post Trial Supplemental Brief of Pltfs/Taxpayers fld.

DATE	PROCEEDINGS
12/3/96	ORDER—Consistent with the Court's opinion in the Reynolds litigation, the Court would hold that the relief to be afforded the Taxpayers in this case is prospective only, and the Court merely notes that there are forms of relief to cure a constitutional violation in tax cases of this nature other than ordering a refund. Because the Court has held that this action is barred by res juricata and the application of that doctrine does not violate the Taxpayer's equal protection rights under the Fourteenth Amendment of the United States Constitution, it is ORDERED that the Taxpayer's claims are dismissed, and the costs of this action are taxed against the Taxpayers. DONE and ORDERED this 3rd day of December, 1996. /s/ William Gordon, Circuit Judge.
1/2/97	NOTICE OF APPEAL, SECURITY FOR COSTS, DESIGNATION OF RECORD FILED W/100
1/30/97	CERTIFICATE OF COMPLETION OF CLERKS RECORD MAILED TO SUPREME COURT & ATTYS.

CASE: CV 91-1079

5/10/91	Complaint fld.
6/5/91	Defts Mot. for Order Consolidating Cases CV-89-2600; CV-90-1591 and CV-90-1711 fld.
6/7/91	Answer fld by defts.
6/24/91	Pltfs Amended Mot. for Order Consolidating Cases fld.
V	Consolidated Discovery—Interrog's, Reg's for Prod. & Reg's for admission by Taxpayers fld.

DATE	PROCEEDINGS
7/8/91	Order consolidating CV-89-2600-G; CV-90-1591-G; CV-90-1711-G; CV-91-397 w/CV-91-1079-TH
2/1/93	Taxpayer et al Response to Motion for Summary Judgment.
2/4/93	Amendment to Taxpayer's Response to MSJ
7/30/93	Deft of Revenue of Second Amended Answer
7/30/93	Deft of " " Second Amended to MSJ
7/30/93	Deft " " " Second Supplemental Brief in Support of MSJ and Motion for Partial Summary Judgment.
8/6/93	Taxpayers Response to Amendments to Motion for Summary Judgment and Supplemental Briefs Denied 8/25/93
9/20/93	Amendment to Complaint for Declaratory Judgment and Refund of Taxes paid under protest fld.
10/1/94	Ordered that these cases are placed on administrative docket of this court; Trial 8/1/94
5/25/94	Third Supplemental Brief in Support of MSJ and Motion for Partial Summary Judgment
12/19/94	Post-Trial Supplemental Brief of Pltfs/Taxpayers fld.
12/3/96	ORDER—Consistent with the Court's opinion in the REYNOLDS litigation, the Court would hold that the relief to be afforded the Taxpayers in this case is prospective only, and the Court merely notes that there are forms of relief to cure a constitutional violation in tax cases of this nature other than ordering a refund. Because the Court has held that this action is barred by res juricata and the application of that doctrine does not violate the Taxpayer's equal protection rights under the Fourteenth Amendment

DATE	PROCEEDINGS
	of the United States Constitution, it is ORDERED that the Taxpayer's claims are dismissed, and the costs of this action are taxed against the Taxpayers. DONE and ORDERED this 3rd day of December, 1996. /s/ William Gordon, Circuit Judge.
1/2/97	NOTICE OF APPEAL, SECURITY FOR COSTS, DESIGNATION OF RECORD W/100 DOCKET FEE
1/30/97	CERTIFICATE OF COMPLETION OF CLERKS RECORD MAILED TO SUPREME COURT & ATTYS.

[Filed Jan. 23, 1990]

CIRCUIT COURT
FIFTEENTH JUDICIAL CIRCUIT

Case No. CV-89-2600-G

SOUTH CENTRAL BELL TELEPHONE COMPANY,
Plaintiff,

v.

STATE OF ALABAMA, DEPARTMENT OF REVENUE,
Defendant.

ORDER PLACING CASE ON ADMINISTRATIVE DOCKET

Pursuant to the letter request of the parties, it is ORDERED that this case is placed on the administrative docket of the Court.

DONE and ORDERED in chambers this 23rd day of January, 1990.

/s/ William Gordon
WILLIAM GORDON
Circuit Judge

[Filed Feb. 8, 1991]

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

CV-89-2252-M

MOBIL OIL CORPORATION, INC.,

CV-89-2253-TH

MOBIL OIL EXPLORATION AND
PRODUCING SOUTHEAST, INC.,

CV-89-2254-PR

MOBIL OIL EXPLORATION AND
PRODUCING NORTH AMERICA, INC.,

CV-89-2475-TH

WEST POINT PEPPERELL, INC.,

CV-89-2511-TH

THE PITTSBURGH AND MIDWAY COAL
MINING COMPANY, INC.,

CV-89-2510-PR

CHEVRON USA, INC.,

CV-89-2586-PR

DOUGLAS OIL COMPANY, INC.,

CV-89-2600-G

SOUTH CENTRAL BELL TELEPHONE COMPANY, INC.,

CV-89-2601-M

CHAMPION REALTY COMPANY, INC.,

CV-89-2602-PH

CHAMPION INTERNATIONAL CORPORATION, INC.,

CV-90-846-PR

MOBIL OIL CORPORATION, INC.,

CV-90-856-TH

NELSON BROTHERS, INC.,

CV-90-858-PH

RYDER INTERNATIONAL, INC.,

CV-90-859-PR

MOBIL OIL EXPLORATION AND PRODUCING SOUTHEAST, INC.,

CV-90-860-TH

MOBIL OIL EXPLORATION AND PRODUCING NORTH AMERICAN, INC.,

CV-90-911-PR

CHEVRON USA, INC.,

CV-90-914-M

FORD MOTOR CREDIT COMPANY, INC.,

CV-90-915-PH

FORD MOTOR COMPANY, INC.,

CV-90-916-PR

FORD NEW HOLLAND, INC.,

CV-90-917-TH

FORD LEASING DEVELOPMENT, INC.,

CV-90-912-TH

CHEVRON CHEMICAL CORPORATION, INC.,

CV-90-957-PH

SHELL OIL CORPORATION, INC.,

CV-90-958-PR

SHELL WESTERN E & P, INC.,

CV-90-959M

SHELL OFFSHORE, INC.,

CV-90-960-PH

CARGILL, INC.,

CV-90-961-PR

HOHENBERG BROTHERS, INC.,

CV-90-962-TH

GEORGIA PACIFIC CORPORATION, INC.,

CV-90-982-PH

BOISE-CASCADE CORP., INC.,

CV-90-1591-G

BELL-SOUTH INC., et al.,

CV-90-1711-P

SOUTH CENTRAL BELL TELEPHONE COMPANY, INC.,

CV-90-2556-M

CSX TRANSPORTATION, INC.,

CV-90-2555-G

CSX TRANSPORTATION, INC.,

CV-90-2557-PH

CSX TRANSPORTATION, INC.,

CV-90-2558-PR

CSX TRANSPORTATION, INC.,

CV-90-2308-PH

FORD EQUIPMENT LEASING COMPANY
Plaintiffs,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE,
Defendant.

MOTION TO AMEND STATE'S MOTION TO CONSOLIDATE AND MOTION TO STAY

The State of Alabama moves this Honorable Court to amend its previous Motion to Consolidate, and further moves for a Stay of all cases pending in this Court. As grounds for said Motion, the State would show unto the Court the following:

1. *Douglas Oil Company, Inc.*, CV-89-2586-PR, should be deleted from the State's consolidation request. This case was included in error, and has been disposed of by Summary Judgment granted August 7, 1990.

2. The South Central Bell and companion cases, CV-89-2600-G, CV-90-1591-G, CV-90-1711-P have previously been consolidated by Order of the Court before the Honorable Judge William Gordon.

3. The CSX cases, CV-90-2556-M, CV-90-2555-G, CV-90-2557-PH, and CV-90-2558-PR have previously been consolidated by Order of the Court before the Honorable Judge William Gordon.

4. The issues for resolution in all of these cases involve identical legal issues as the cases presently pending before Judge Gordon.

5. All of the Plaintiff corporations are represented by the same counsel.

6. The attorneys for the State and for all of the cases hereinabove, including the consolidated cases pending before Judge Gordon, have agreed upon shared joint discovery in the interest of judicial economy and to avoid unnecessary costs or delay.

7. The attorneys for the State and for all of the cases listed hereinabove have agreed to be bound by the final ruling rendered in the consolidated CSX and South Central Bell cases currently pending before Judge Gordon.

WHEREFORE, the State respectfully requests that this Honorable Court enter an Order deleting Douglas Oil Company, Inc., CV-89-2586-PR, from consolidation, deleting the CSX cases and South Central Bell and companion cases which are already consolidated before the Honorable Judge William Gordon, and granting the consolidation of the remainder of the cases listed hereinabove. The State further requests that this Honorable Court will enter an Order granting a Stay of all the cases pending before this Court until resolution of the "CSX" and South Central Bell and companion cases previously consolidated and currently pending before the Honorable Judge William Gordon.

/s/ Nancy I. Cottle
NANCY I. COTTLE
Assistant Counsel
Department of Revenue and Assistant
Attorney General, State of Alabama
P.O. Box 320001
Montgomery, AL 36132-0001
Telephone: 242-9690

Attorney for State of Alabama
Department of Revenue

[Filed Aug. 22, 1991]

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

CV-89-2600-G
and Consolidated Cases

SOUTH CENTRAL BELL TELEPHONE COMPANY,
Plaintiff,

vs.

STATE OF ALABAMA, DEPARTMENT OF REVENUE,
Defendant.

ANSWER TO INTERROGATORIES

Pursuant to Rule 33, Alabama Rules of Civil Procedure, the State of Alabama Department of Revenue answers the Interrogatories propounded to it by the BellSouth companies as follows:

1. Ernest Broadhead, Chief, Franchise Tax Division, Alabama Department of Revenue, 50 Ripley Street, Montgomery, Alabama 36104, (205) 242-9800.

2. I have no knowledge of the exact components utilized by the Department to compute "capital employed in this State" for the years prior to 1961.

A. Apparently, on September 8, 1961, upon the passage of Act No. 912, this component was first delineated specifically by statute.

B. Same as A.

C. Same as A.

D. Same as A.

3. Yes.

4. I do not know whether paid-up capital stock was ever included in the tax base.

A. See 4 above.

B. Yes.

C. No.

D. No.

E. The statute requires that the tax on domestic corporations be based on their capital stock.

F. The statute does not refer to actual book values.

5. No.

6. A. Yes.

B. The total capital is increased if the increase in indebtedness is long term or involves debt to a parent or subsidiary which is not also required to pay a franchise tax to Alabama.

C. Yes.

7. Capital stock.

8. Capital employed in Alabama, less certain deductions.

9. Total value of the shares, less deductions.

10. I don't know the legislative purpose for the franchise tax.

A. No.

B. I do not know.

C. I do not know.

D. I do not know.

E. I do not know.

11. County tax collectors are so authorized; however, the shares tax in fact is virtually always paid by the corporation.

12. Yes.

13. I do not know.

14. The Department objects to this question on the grounds that this information is confidential and is contained only on the returns of the taxpayers. The share tax information is not contained on the returns and it is not available. See answer to Question 1 of Request for Production.

15. See the answer to 14.

STATE OF ALABAMA)
)
MONTGOMERY COUNTY)

Personally appeared before the undersigned authority in and for said County and State Ernest J. Broadhead, who after being first duly sworn, depose on oath and say that the foregoing answers are true and correct to his best knowledge, information and belief.

/s/ Ernest J. Broadhead
Affiant

[Notary Omitted]

[Filed Oct. 17, 1991]

CIRCUIT COURT
FIFTEENTH JUDICIAL CIRCUIT

Case No. CV-89-2600-G

SOUTH CENTRAL BELL,
Plaintiff,

v.

REVENUE DEPARTMENT,
Defendant.

ORDER

It is ORDERED that the above-styled case is transferred from the administrative docket to the regular docket.

DONE and ORDERED this 17th day of October, 1991.

/s/ William Gordon
WILLIAM GORDON
Circuit Judge

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY, ALABAMA

Case No. CV-89-2600
(with consolidation of
CV-90-1591, CV-90-1711,
CV-91-397 & CV-91-1079)

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*,
Plaintiffs,

vs.

STATE REVENUE DEPARTMENT,
Defendant.

Case No. CV-90-2555
(with consolidation of CV-90-2556,
CV-90-2557, CV-90-2558, CV-91-2151)

CSX TRANSPORTATION, INC,
Plaintiff,

vs.

STATE REVENUE DEPARTMENT,
Defendant.

Consolidated as CV-89-2600-G

DEPOSITION OF ERNEST J. BROADHEAD

* * * *

[53] Q. Insofar as the domestic corporation is concerned, can it not freely under the corporate laws of this

state reduce its tax liability by changing the par value of its stock at any time?

[54] A. Yes.

Q. Okay. So if it had been incorporated for this hundred thousand dollar fictional, and that had been the par value initially, but it got a good CPA or lawyer who advised it to let's have a corporate amendment and amend the charter to a thousand dollar par value, you would reduce the domestic franchise tax substantially.

A. Yes.

Q. And so I'll use it, for no better term, you can manipulate the amount of domestic shares tax paid in Alabama by manipulating the par value of the stock?

A. Yes.

Q. Okay. Let's go to the foreigns. We had started there. And other than some financial institutions which do not pay shares tax or franchise tax to the State of Alabama, a foreign corporation, for franchise tax purposes, is defined as a corporation organized under the laws of some unit, state, government, other than the [55] State of Alabama.

A. Yes.

Q. That's a foreign.

And as foreign corporations, they are required to pay a mandated foreign franchise tax based—as a foreign corporation, based on Section 40-14-41?

A. Yes.

Q. And there is nothing—as long as they remain a foreign corporation, there is no way that they can avoid the tax under Section 41?

A. As long as they remain qualified to do business in Alabama.

Q. Right.

A. That's correct.

Q. There is no way they can—Strike that.

Under the constitution of Alabama, insofar as foreign corporations are concerned, is there a constitutionally mandated franchise tax on foreign corporations?

A. Yes.

[56] Q. And is that Section 232 in the constitution?

A. Yes.

Q. And what is the exact language, if you will, if you recall, of the tax base imposed by the constitution which mandates the tax on foreign corporations?

A. Capital employed in this state.

Q. Okay. And that's the actual amount of capital employed in this state, correct?

A. Yes.

Q. So it's the real value?

A. Yes.

Q. It's not a fictional value?

A. Yes.

Q. It's an up-to-date value, a market value; is that not correct?

A. As of tax date.

* * * *

[69] Q. We go back to your 1983 study. I think that's it sitting right over there, which is the one that's introduced, I think, there, which is Taxpayer's Exhibit One and also 1-A, which is the calculations for that spread sheet. And ask you that in your calculations here and in your study, did it relate primarily to the differences between the domestic franchise tax levied and the [70] foreign franchise tax levied pursuant to their respective statutes.

A. Yes.

Q. In that study did you compute the as-if foreign tax for the domestic corporations? In other words, take the domestic corporation and say, all right, here is your tax as a domestic, but now I am going to assume that you are a foreign, and I am going to take the foreign tax base, as set forth in Section 41, and the foreign tax rate, as set forth in Section 41, and calculate your tax as if you were a foreign corporation.

[71] A. Yes.

Q. All right. And what did that study show, if you recall? And do you need anything to reference?

A. It showed the amount of tax that would have been paid by the domestic corporations if they were, in fact, filing as foreign corporations.

Q. Do you remember the figures? Wasn't it [72] substantially greater for the same corporations taxed as if foreign rather than as domestics?

A. Yes.

Q. All right. And I believe you said at that time eight to one, is that correct, that—if I remember correctly?

A. No, I believe—

Q. Was it eight to two?

A. Yes, that would be more—it was something like seventy-eight to—seventy-eight to seventy-nine percent of the tax—I'm sorry. I'm confused.

Q. Think it out.

A. Explain what you were really asking, Walter.

Q. All right. I'm saying, did you convert the domestic and look at their actual financial statements and take a domestic and convert it, so to speak, for tax purposes only, call it an as-if foreign corporation, take the same corporation and apply the foreign franchise tax rates and base and calculate what the domestic would have paid as it did [73] as a domestic and what it would have had it been a foreign corporation?

A. Yes. And it would have been in the neighborhood of eight to one.

Q. Eight to one, I thought, was right.

Now, I believe that in your testimony in that case, the White case, that you said you did not use an allocation factor. And what I'm saying, you used a hundred percent allocation, that all of the property of the domestics was employed in Alabama.

A. Yes.

Q. But that this wasn't a significant factor and did not really have any substantial effect on your conclusions; is that correct?

A. I don't remember that I testified to that, but I would now say that that would be substantially correct. That the great majority of the capital being employed by domestic corporations would, in fact, be employed in Alabama overall.

Q. Now—

A. Let me change that great majority to say a [74] substantial majority.

* * * *

[82] Q. One thing that—Let's go back to the domestics. Go back to par value for a moment, which is the base used by domestic corporations if, indeed, they have a par value.

A. Okay.

Q. If it's a no-par value domestic corporation, you use stated value, is that correct, for that domestic?

A. Yes.

Q. And stated value, again, is just what the incorporators say it is. Has no relationship whatsoever to the amount—the value, the actual value of the capital stock.

A. That's correct.

Q. And it, too, can be manipulated by the incorporators to be any figure they want it to be, and thereby reduce—if they reduce the stated value, reduce the domestic franchise tax?

A. Yes.

* * * *

[105] Q. With regard to the differentiation, [106] inequality, whatever you want to call it, between the domestic franchise tax and the foreign franchise tax, do you know of any legitimate state purpose for having a different franchise tax base between domestics and foreigns, other than with foreigns you can only use the

capital employed within the state? Other than that distinction, can you think of any legitimate state purpose for having a different tax base?

A. No.

Q. All right. Is there any legitimate state purpose that you can think of that would justify a disproportionate burden of franchise tax between domestics and foreigns?

A. No.

Q. Does Alabama—the State of Alabama or any of its agencies provide foreign corporations with any services that it doesn't provide domestic corporations? And that's foreign corporations within this state.

[107] A. None that I know of.

Q. Does it incur any substantial cost regarding foreign corporations that it doesn't incur with regard to domestic corporations?

A. None that I know of.

Q. Is there any rational basis within your knowledge as to why foreign corporations are taxed differently than domestic corporations other than the law—the Alabama law?

A. No.

* * * *

[Exh. 17]

ESTIMATED CORPORATE SHARES TAX BY COUNTY AND COMPUTATION OF AVERAGE STATE-WIDE MILLAGE RATE PAID ON CAPITAL STOCK BY DOMESTIC CORPORATIONS

Computation of Average Shares Tax Millage Rate 1982-1992

Tax Year	Taxable Residue	Estimated Tax	Average Millage
1982	220,753,542	9,635,155	0.04365
1983	255,984,833	10,810,740	0.04223
1984	303,091,259	12,755,810	0.04209
1985	294,683,754	12,547,251	0.04258
1986	301,867,209	12,600,092	0.04174
1987	356,938,434	15,226,560	0.04266
1988	343,409,485	14,293,941	0.04162
1989	482,336,486	19,922,054	0.04130
1990	439,023,555	18,401,718	0.04192
1991	490,090,432	21,036,205	0.04292
1992	490,104,967	20,877,536	0.04260
TOTALS	3,978,283,956	168,107,061	0.04226

• • • • •

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

[Caption Omitted]

AFFIDAVIT OF ADELE HOWELL SHEPHERD

STATE OF GEORGIA)

FULTON COUNTY)

Before me, the undersigned authority, in and for said County and State, personally appeared Adele Howell Shepherd, who being known to me and who being by me first duly sworn, does on her oath depose and say as follows:

1. My name is Adele Howell Shepherd. I am employed by BellSouth Corporation as a Corporate Manager - Taxes, where I have since 1984 been responsible for research, audit and compliance for all types of taxes other than income taxes for BellSouth Corporation and its unregulated ventures. My staff prepares and files the Alabama franchise tax returns for most to the BellSouth companies that are parties to this litigation. Since 1972 I have been employed by various BellSouth companies in the comptrollers (accounting) department and tax department. After completing my masters degree in accounting (Masters of Professional Accountancy at Georgia State University 1974) and passing the Certified Public Accountants examination, I was transferred to the tax department of Southern Bell Telephone and Telegraph in 1976 where I worked on the Southern Bell's federal income tax return. In 1978 I moved to internal auditing

with a major assignment to participate in audits of federal income tax returns prepared by other AT&T subsidiaries. I subsequently worked on the federal income tax audit in the AT&T Tax Department in New York for two years. In 1982 I transferred to Southern Bell as District Manager in Other (non-income) Taxes where I was responsible for the research, audit and compliance functions for payroll taxes, state sales and use taxes, state gross receipts taxes, state franchise taxes and state intangible taxes. In 1984 I was transferred to BellSouth Corporation where I have been employed in my present capacity.

I am familiar with the operations of and the Alabama franchise tax returns of all of the BellSouth companies that are party to this litigation (i.e. BellSouth Telecommunications, Inc., South Central Bell Telephone Company, BellSouth Corporation, BellSouth Services, Inc., BellSouth Products, Inc., BellSouth Financial Services Corporation, BellSouth Advertising & Publishing Corporation, BellSouth Resources, Inc., Alabama Cellular Services, Inc., Sunlink Corporation, and TechSouth, Inc., all of which are incorporated in states other than Alabama, are qualified to do business in Alabama and are engaged in interstate commerce.

I have personal knowledge of the matters set forth in this affidavit which is made for use in opposition to the motion for summary judgment filed by the State of Alabama and the Commissioner of Revenue. In my capacity as Corporate Manager - Taxes I was assigned the responsibility of preparing the petitions for refund and other challenges of the Alabama franchise taxes paid by South Central Bell Telephone Company and the other BellSouth companies which have become parties to this litigation. These companies have filed petitions for refunds or challenges in each of the franchise tax years commencing in 1986 through the present time. The amount of tax paid by each of these taxpayers for each of the tax years is

accurately set forth in the complaints which have been consolidated into the present litigation. Each of the petitions and challenges was timely filed as was each of the appeals and complaints before this court. All were consolidated into the current action challenging the Alabama franchise tax levy on these corporations which were organized under the laws of states other than the state of Alabama and as such are required to pay Alabama franchise taxes as foreign corporations pursuant to Al. Code 1975 Section 40-14-41.

2. In connection with these challenges of the Alabama franchise tax scheme and the discriminatory tax burden on these BellSouth Companies, I was assigned the job of developing evidence to support the premise that the Alabama franchise tax scheme as applied is arbitrarily discriminatory in favor of domestic corporations organized under Alabama law to the detriment of these foreign corporations. To develop this evidence, consolidated discovery including interrogatories, requests for admissions and requests for production were filed on June 24, 1991. In response to the production requests, the State provided a computer printout detailing certain data elements and franchise tax amounts paid by foreign and domestic corporations for the years 1988 through 1991 (several boxes full), together with copies of studies prepared by the Department of Revenue in connection with various legislative proposals. The computer printout was introduced into evidence as Exhibit 19 to the deposition of Ernest Broadhead, Chief of the Franchise Tax Division, Alabama Department of Revenue. The balance of production is on file with the Court and is attached to the taxpayers' response to motion for summary judgment. The data produced was analyzed by me and the staff of my office and the memorandum attached hereto was prepared by me and my staff showing how the Department's data demonstrated that the Alabama tax scheme resulted in discrimination in favor of domestic corporations to the

detriment of foreign corporations. The memorandum and schedule prepared from this data is attached to this affidavit as Exhibit 1 and made a part hereof.

3. The information produced by the Department provided a sample of domestic and foreign corporations, their franchise tax payments, estimated domestic shares tax, total capital employed and included the allocation factor for each of these corporations from which to determine "capital employed" in the State of Alabama and a calculation of the capital employed in Alabama. (Copy attached as Exhibit 2 and made a part of this affidavit.) Using the Department's available data, this calculation was made on the schedule attached as Exhibit 1, utilizing the actual allocation factor developed by the Department of Revenue from its record. In the *Reynolds* case, the Department used similar information to determine the "as if foreign" franchise tax liability of the domestic corporations, but these calculations were not accepted as conclusive by the Alabama Supreme Court because the Department failed to use the allocation factor available to it, but rather calculated "as if foreign" franchise tax liability on the assumption that most or all domestic corporations employed all of their capital in the State of Alabama.

4. The primary function of my involvement in the franchise tax challenge was developing a methodology for accurately comparing the domestic franchise tax burden with the foreign franchise tax burden to demonstrate discrimination in favor of domestic corporations and detrimental to foreign corporation including the BellSouth taxpayers. Using the *Reynolds* opinion as a road map of pitfalls to avoid, we determined that actual, corporation-specific information should be developed rather than the use of averages and illustrative data which were dismissed as not being conclusive. The BellSouth taxpayers and companion CSX taxpayers determined that the methodology would include more detailed and conclusive evidence based on actual data contained in the tax returns filed by specific corporations. To this end methodology was developed that would enable these taxpayers to compute an "as if foreign" franchise tax liability for domestic corporations, based on an actual determination of the capital employed in Alabama utilizing the property allocation factor determined from the tax returns, and to compare that "as if foreign" liability with the amount of domestic franchise tax actually paid by the same corporations. Based on this methodology, an "as if foreign" franchise tax liability would be computed for each domestic corporation by preparing a simulated foreign franchise tax return for each domestic corporation based on the amount of capital actually employed by the domestic corporation in Alabama.

5. Because of the massive amount of data contained in the computer printout produced by the Department and the lack of complete information contained thereon, a a second request for production sought all data in the Department's possession relating to franchise tax liabilities of domestic and foreign corporations and domestic shares tax paid by domestic corporations in magnetic medium form. The state responded by providing five magnetic tapes containing four files: (1) "FRAN FOR RV.FT.FF. ALL.YRS", (2) "RV.FT.FD.ALL.YRS FRAN DOM", (3) "RV.FT.SHARES.ALL.YRS" and (4) "RV.FT. CNTY.DIST.ALL.YRS". In addition, the Department provided a record layout for each file.

These magnetic tapes were introduced as Exhibit 18 to the deposition of Ernest Broadhead.

6. These magnetic tapes and record layouts were delivered to Elrick & Lavidge, a computer subsidiary of Equifax Corporation. Elrick read the tapes and printed out records for our review. However, it was determined that much of the supporting financial information, includ-

ing financial data such as balance sheet data, required to be provided with franchise tax returns and with domestic shares returns, was not included in the state's computerized files. The initial plans were to compute "as if foreign" franchise tax liability for each domestic corporation using the state's computerized files. However, the state's computerized files do not contain complete financial data in many instances, such as balance data necessary for the "as if foreign" calculations. We determined that it was necessary to review to the various tax returns to have access to the necessary supporting financial information to accurately compute an "as if foreign" franchise tax liability for each domestic corporation.

In view of the massive volume of information necessary to be accumulated manually, because of the incomplete computerized information, and because using all the domestic franchise tax returns would have produced an unmanageable mass of paper, it was determined that it was necessary to develop a statistically valid sample to perform the necessary computations. Dr. Larry Richards, a statistician who is the Chairman of the Decision Sciences Department of the School of Business at the University of Oregon and who has vast experience as a statistician employed to conduct studies relating to taxation, was enlisted to help design a statistically valid sample of domestic franchise tax accounts. Dr. Richards had Ray Beard of Elrick & Lavidge perform a frequency distribution of domestic corporations based on a ratio of each corporation's net worth to its total par value of capital stock. Mr. Beard was instructed to use and did use the data element "SHARES-TOTSHARES" from the domestic shares tax tape for net worth and the data elements, "FD-PARCOM," "FD-PARPFRD," "FD-TOTALCOM," and "FD-TOTALPFRD," from the domestic franchise tape to develop total par value in accordance with the following formula: ([FD-PARCOM times FD-TOTALCOM] plus [FD-PARPFRD times FD-TOTALPFRD]).

To compute this ratio of net worth to total par value it was necessary to have a corporation which appeared on both the domestic franchise tax tape and the domestic shares tax tape because data elements from both of these tapes were necessary to compute the ratio.

After Beard had computed the ratios and performed a frequency distribution with 30 classes, Dr. Richards stratified the population for each year into seven groups, as follows:

Strata	*Ratio*
1	0.0
2	0.01-2.60
3	2.61-55.00
4	55.01-130.00
5	130.01-450.00
6	450.01 and over
7	Alabama Power Company

Alabama Power was included as a separate stratum because it is larger in size than any other domestic corporation and its inclusion in any other stratum would most likely have distorted that grouping.

After the strata were established, Dr. Richards determined a sample size of 25 from each stratum for each of the four years (1988-1991) covered in the computer tapes would provide adequate reliability. To ensure that the sample include 25 domestic corporations with adequate financial data from which compute an "as if foreign" franchise tax liability, Dr. Richards instructed Ray Beard to draw a true random sample of 100 accounts for each stratum for each year. The total sample drawn would give a minimum of 604 franchise tax returns and 600 shares tax returns (Alabama Power files no shares tax returns) and a maximum of 2404 franchise tax returns and 2400 shares tax returns.

7. To complete the financial data, the State provided access to its records for the making of copies of the domestic franchise tax returns and the domestic shares tax returns for the sample corporations. I, along with James Hanford, CSX Transportation, supervised and participated in the pulling and copying of these returns. Domestic franchise tax returns were pulled first. For each stratum, the franchise tax returns were pulled until there were 25 accounts with adequate balance sheet data. Shares tax returns were then pulled, again until there were 25 accounts with adequate balance sheet data. If this resulted in more domestic shares tax returns for a particular stratum, a corresponding franchise tax return was then pulled. A separate second effort was made to locate any tax returns that had been missing at the time of the first attempt to locate that record. Upon completion, 1,078 domestic corporations had their tax returns pulled. The distribution of the domestic corporations within the sample and by stratum is accurately set forth in tables 2a-2d appearing as pages 11, 12, 13 and 14 of the study prepared by Dr. Richards, a photocopy of which tables is attached hereto as Exhibit 3 and made a part of this affidavit.

8. The domestic franchise tax returns and domestic shares tax returns were reviewed by me and Jim Hanford of CSX Transportation or under our supervision. It was determined by this review that these returns did not provide all the data requested to be included on the returns. Without this information we would be unable to determine positively whether a corporation's financial data contained certain elements that figured into an "as if foreign" franchise tax computation. (e.g., deferred income taxes, investment in subsidiaries, etc.). State income tax returns which require comparable data were requested for the sampled corporations. Pursuant to court order the Department of Revenue pulled the Alabama income tax

returns of the sampled corporations and permitted the same to be copied for use in our data study.

9. Upon obtaining copies of all domestic franchise tax returns, domestic shares tax returns and state corporate income tax returns, a separate file folder containing all returns for each corporation in the sample was labeled with tax year, stratum, account number, and selection (001-100). These folders are filed by stratum and by tax year. The file folders containing the domestic franchise tax returns, the domestic shares tax returns, the Alabama corporation income tax returns, and the completed input worksheets are made Exhibit 4 to this affidavit and made a part thereof. Because of the volume of these records, taxpayers retain possession until the records are needed by the Court.

10. Jim Hanford and I designed an input worksheet upon which to accumulate data to be input into a program developed by Elrick & Lavidge to compute an "as if foreign" franchise tax liability for each domestic corporation in the sample. This worksheet is attached hereto as Exhibit 5 and made a part hereof. A sample file folder with the completed input worksheet is attached as Exhibit 6. The input worksheets were filled out by Jim Hanford and/or me or under our direct supervision using the data available in the three tax returns and attachments for each of the sampled domestic corporations. To provide for consistency in the comparison of domestic tax paid with an "as if foreign" franchise tax for each of the same domestic corporations, the balance sheet and associated detail that supported the domestic franchise tax return was used, including the balance sheet from a prior year's income tax return where the taxpayer reported on a fiscal year basis. A fiscal year balance sheet is permitted by statute (Sec. 40-14-44).

Of the data elements required to compute an "as if foreign" franchise tax liability, some were readily avail-

able on the corporation's balance sheet (e.g., capital stock, surplus, long-term debt, etc.) or from the detail required to be provided for certain balance sheet accounts (e.g., detail for "other liabilities" or "other current liabilities" should disclose any deferred income taxes). Other data elements were readily available from the shares tax return (e.g., value of air and water pollution control equipment). Certain data elements were not readily available from the tax returns and supporting schedules obtained from the state. A discussion of each data element and the steps taken to compensate for the data not being available follows.

A. *Inclusions*

(1) Accelerated depreciation or amortization—Information needed to estimate this data element would generally be available only through a detailed review of a company's fixed asset and depreciation records which are not required to be provided with any tax return.

Treatment in the "as if foreign" tax computation: No attempt was made to estimate this data element. Since it would increase the tax base, excluding it understates the "as if foreign" franchise tax liability and the amount of discrimination that occurs. Therefore, excluding it is a conservative position that favors the state.

(2) Debt payable to individual shareowner who owns more than 10% of the capital stock of the corporation—Debt payable to shareowners is a separate line item on the balance sheet in the domestic franchise tax return and on the balance sheet schedule for the domestic income tax return.

Treatment in the "as if foreign" tax computation: In many instances (especially for Subchapter S and other closely held corporations), we were able to determine the exact ownership of the corporation and thus determine whether any debt payable to shareowners shown on the balance sheet was payable to an individual who owns more than 10% of the corporation. Where we were not able to make this determination, the debt was excluded from the "as if foreign" franchise tax capital base—a conservative treatment that understates the "as if foreign" franchise tax liability and, therefore, favors the state.

(3) Debt payable to another corporation that owns more than 50% of the capital stock of the corporation—As indicated in (b) above, debt payable to shareowners is a separate line item on the balance sheets.

Treatment in the "as if foreign" tax computation: Where a balance sheet indicated debt to shareowners and corporate shareowners was involved, we were seldom able to determine that one corporation owned more than 50% of the stock. Where we could not make that determination, the debt was excluded from the "as if foreign" franchise tax capital base—a conservative position that understates the "as if foreign" franchise tax liability and, therefore, favors the state.

(4) Debt payable to a more than 50% owned subsidiary that is not required to pay Alabama franchise tax—Debt payable to subsidiaries is not a separate line item on the balance sheet.

Treatment in the "as if foreign" tax computation: We were virtually never able to identify this item. To the extent this item was buried in with debt to affiliates or other types of accounts payable, it was excluded from the "as if foreign" franchise tax capital base—a conservative position that understates the "as if foreign" franchise tax liability and, therefore, favors the state.

(5) Deferred income tax—Deferred income tax is not a separate line item on the balance sheet in the domestic franchise tax return or on the balance sheet schedule for the domestic income tax return. It is generally included in "other liabilities" or "other current liabilities."

Treatment in the "as if foreign" tax computation: When detail was provided as required for "other liabilities" or "other current liabilities," we were generally able to determine an amount (zero or otherwise) for deferred income taxes. Where no detail was provided, we could not make this determination and, to the extent the undetailed liability accounts included deferred taxes, this amount was excluded from the "as if foreign" franchise tax capital base—a conservative position that understates the "as if foreign" franchise tax and, therefore, favors the state.

B. *Exclusions*

(1) Investment in the capital of other corporations paying the Alabama franchise tax—Investments in subsidiaries is not a separate line item on the balance sheet in the domestic franchise tax return or on the balance sheet schedule for the domestic income tax return.

Treatment in the "as if foreign" franchise tax computation: If there was an amount on the "Other investments" line on the balance sheet, it was treated as an exclusion even if it was not possible to determine that the investment was in a corporation paying the Alabama franchise tax. This reduced the "as if foreign" tax base and is a conservative position that understates the "as if foreign" franchise tax and, therefore, favors the state.

(2) Investment is subsidiaries operating exclusively outside Alabama—same as item 2a, above.

C. *Deductions*

(1) Investment in securities issued by Alabama or its political subdivisions—Investment in federal and state securities is a line item on the balance sheet in the domestic franchise tax return and on the balance sheet schedule for the domestic income tax return.

Treatment in the "as if foreign" franchise tax computation: If the balance sheet indicated investment in federal and state securities, the amount was treated as a deduction unless it could be positively identified as federal obligations or as securities of a state other than Alabama. This is a conservative position that understates the "as if foreign" franchise tax liability and, therefore, favors the state.

(2) Mortgages receivable on Alabama real estate on which recording privilege tax has been paid—Mortgages receivable is a separate line item on the balance sheet in the domestic

franchise tax return and on the balance sheet schedule for the domestic income tax return.

Treatment in the "as if foreign" franchise tax computation: If there were mortgages receivable, they were treated as a deduction from the "as if foreign" franchise tax base even if it was not possible to determine that they were related to Alabama real estate or, if so, that the recording privilege tax had been paid. This is a conservative position that reduces the "as if foreign" tax base for any account with mortgages receivable and, therefore, favors the state.

(3) Book value of property used in manufacturing in qualifying counties—The deduction from the foreign franchise tax base for certain manufacturing property (Ala. Code Sec. 40-14-41(d)(2)d) is the same as the deduction from the domestic shares tax base (Ala. Code Sec. 40-14-70(d)(3)) that was available during at least part of the years involved here (1988-1991). However, there is no place on the domestic shares return to list such a deduction from the shares tax so we could not rely on the shares tax return for this data element.

Treatment in the "as if foreign" franchise tax computation: Manufacturers in the sample were identified. The county or counties in which these manufacturers operate were identified through information on the various tax returns. A list of counties in which a manufacturer could have qualified for a deduction for manufacturing property during each tax year was developed by comparing unemployment rates for each of Alabama's

counties for each tax year to the national average for that year. Information for this analysis was obtained from the Alabama Department of Industrial Relations. For manufacturers with property located in qualifying counties, an estimate of book value of property used in manufacturing (computed as described in the following paragraphs) was included as a deduction in the "as if foreign" tax computation.

A list of the seven (and only) foreign corporations (and their franchise tax account numbers) that have ever qualified for a manufacturing deduction under Sec. 40-14-41(d)(2)d was obtained from the Department of Revenue. For each of those seven, we pulled from the foreign franchise tax tape provided by the Department ("FRAN FOR RV.FT.FF.ALL.YRS") the data elements "ALA-CAPT" (franchise tax base before deductions) and "VALUINVS" (book value of manufacturing property deducted from the franchise tax base). We used these data elements to develop a composite ratio of VALUINVS to ALACAPT for each year.

For each domestic manufacturer located in a qualifying county, we computed an estimated deduction for manufacturing property by multiplying the "as if foreign" franchise tax base before deductions times the composite ratio of VALUINVS to ALACAPT for foreign corporations developed as described in the preceding paragraph.

We included such a deduction even though the Department of Revenue advised that no domestic corporation has ever qualified for a

manufacturing exemption on its domestic shares tax return (and only seven foreign corporations have qualified for an exemption on the foreign franchise tax return). This is a conservative position that understates the "as if foreign" franchise tax base and, therefore, favors the state.

(4) Other—If there was any asset item whose character could not be identified, it was treated as a deduction from the franchise tax base. For example, if a taxpayer did not provide the requested detail for the "other assets" or "other current assets" account, the amounts in these accounts were assumed to be eligible to be deducted from the franchise tax base as, for example, investments in Alabama securities. This is a conservative position that understates the "as if foreign" tax liability of the accounts in the sample and, thus, favors the state.

D. *Apportionment*

The Alabama statute levying the foreign franchise tax imposes the tax on "capital employed in Alabama." The statute provides no guidance on how capital is to be apportioned to Alabama for a multi-state company. Instructions on the foreign franchise tax return and in regulations describe certain apportionment factors, including property, to be used for various types of businesses.

In many states, the data needed to compute apportionment factors for most types of companies would be available in the company's income tax return. However, Alabama does not use apportionment except for Subchapter S corporations. Therefore, the data needed to compute all the

different possible apportionment factors was not generally available. "Capital employed in Alabama" was derived by apportioning with the one factor—property—that could be ascertained with accuracy for each account. The use of the property factor is consistent with the decisions of the Alabama Supreme Court. Thus, for developing the "as if foreign" franchise tax base, capital was apportioned to Alabama using the property factor derived as follows: Property located outside Alabama (obtained from the domestic shares tax return) was subtracted from the book value of total property obtained from the balance sheet. The remainder was Alabama property and was divided by book value of total property to obtain an apportionment factor.

11. An "as if foreign" franchise tax liability was computed for each corporation in the sample. These computations were performed by Ray Beard using a program he developed based on instructions prepared by me in conjunction with Jim Hanford, a copy of which instructions is attached hereto as Exhibit 7 and made a part hereof. The results of those computations are detailed for each corporation in Exhibit 8, attached hereto and made a part hereof.

Additionally, an average estimated domestic shares tax liability was computed for each corporation, although the statute—Sec. 40-14-70(a)—specifically provides that this domestic shares tax shall be assessed to the person in whose name the shares stand on the books of the corporation and not to the corporation. This average estimated domestic shares tax liability was computed in two different ways for each tax year using data from several sources. One computation was performed using the maximum millage rate in a county for the applicable tax year; the other computation used a statewide weighted composite

average millage rate provided by the Alabama Department of Revenue.

For the first computation, a table of county rates was developed which rates were the maximum for each county for each tax year, 1988-1991, and were taken from data provided by the Department of Revenue, Public Utility Section, Ad Valorem Tax Division. Ray Beard, who developed this table of county rates from the data furnished, then multiplied the shares tax base for each account (data element "SHARES-RESIDUE" from the shares tax file, "RV.FT.SHARES.ALL.YRS SHARES") times the maximum tax rate applicable for the county shown on that account (data element "SHARES-CNTY-CODE" on the shares tax tape) to obtain an "estimated shares tax" for that account. This computation was performed for each account on the shares tax tape, not just those included in the sample. The sum of the total estimated shares tax amounts for each tax year was divided by the total number of domestic accounts on the shares tax file for that tax year to produce an "estimated average shares tax" liability for that year. Because the maximum rate for each county was used for the computation, this "estimated average shares tax" is overstated.

For the second computation, Beard provided to Dr. Richards the sum of the data element "SHARES-RESIDUE" for all domestic shares tax accounts for each tax year, together with the total number of domestic shares tax accounts for each year. Dr. Richards computed an "estimated average shares tax" for each tax year by multiplying the total domestic shares tax base times the statewide average millage rate provided by the Department of Revenue, and then dividing the product by the total number of domestic shares accounts.

12. In my opinion as a tax professional with approximately 11 years of experience dealing with state franchise taxes imposed upon corporations including the Alabama

franchise taxes, I am of the opinion that the methods employed as set forth in this affidavit are proper for the development of an accurate comparison between the domestic franchise tax actually paid by a domestic corporation and the "as if foreign" franchise tax liability of that same corporation, and that the methodology employed is proper and the result of the methodology was accurate.

/s/ Adele Howell Shepherd
ADELE HOWELL SHEPHERD

[Notary Omitted]

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

[Caption Omitted]

AFFIDAVIT OF LARRY E. RICHARDS, Ph.D.

STATE OF OREGON)

COUNTY OF LANE)

Before me, the undersigned authority, in and for said County and State, personally appeared Larry E. Richards, who is known to me, and, being first duly sworn upon his oath, deposes and says, as follows:

1. My name is Larry E. Richards. I am presently Chairman of the Decision Sciences Department at the University of Oregon. Decision sciences include the science of applied statistics. I have served as an expert professional statistician in numerous capacities, including conducting research and studies and testifying as an expert witness in numerous cases challenging state taxes, for a period of more than 20 years. Additionally, attached as Exhibit "A" hereto and incorporated herein by reference is a true and correct copy of my vita. I have personal knowledge of the matters set forth in this affidavit which is made for the purpose of opposing a Motion for Summary Judgment in the captioned litigation challenging the Alabama franchise tax scheme.

2. I was employed by the Taxpayers in this litigation which include BellSouth Corporation and its related companies, including South Bell Telephone Company ("BellSouth Companies") and CSX Transportation, Inc. ("CSXT") to conduct a statistical study to determine

whether the Alabama franchise tax scheme was discriminatory between domestic and foreign corporations prior to 1992. I was made familiar with and furnished information in the form of computer tapes and printouts relating to the Alabama domestic and foreign franchise taxes and the Alabama domestic shares taxes, and data collections and calculations taken therefrom, and based on my review of this information and discussions with Adele H. Shepherd of the BellSouth companies and James D. Hanford of CSXT, among others, I developed the methodology for accomplishment of a comparison between a domestic corporation as it is actually taxed and that same domestic corporation taxed as if it were a foreign corporation. Included within the methodology designed by me was the development of a ratio of corporate net worth to par-value and the design and development of 7 strata from which domestic corporations were randomly selected. A design of the ratio, strata and the method and number of the randomly selected domestic corporations was developed by me.

Throughout the accumulation of the data for the study, I was directing Ray Beard of Elrick & Lavidge, computer subsidiary of Equifax Corporation, to read the computer tapes furnished by the Alabama Department of Revenue and printed out records to implement the ratio designed by me, and to randomly select the sampled corporations in accordance with the number and strata designed and directed by me. Throughout the development of data, I consulted with and directed the operations by Adele Shepherd and James Hanford to determine that the same were being conducted in a statistically correct and accurate manner.

3. Based on the foregoing information which was received from the actual tax returns filed by the sampled corporations, including the domestic franchise tax return, the domestic shares tax return and the corporate income tax return, I then conducted a statistically valid study of

the sampled Alabama domestic corporations treated as if foreign corporations to determine if there were franchise tax discrimination and the extent of any such discrimination between domestic and foreign corporations.

Attached hereto as Exhibit "B" and incorporated herein is "A Study of the Differences in the Franchise Tax Liability for Foreign vs. Domestic Corporations in Alabama," which was performed and prepared by me, based on data and information taken from actual tax returns and developed according to my statistical design from the production made by the Alabama Department of Revenue. The statistical procedures that were applied in this research (stratification, sampling, estimators, tests and interval estimates) have mathematical (provable) foundations and are in accordance with generally accepted valid statistical practice and procedures. The data used to perform this analysis were provided by or obtained from the State of Alabama Department of Revenue and its collection and use was performed under my direction and supervision, and the facts, information, finding and conclusions contained therein are true and correct.

Additionally, I have reviewed the affidavit of Adele Howell Shepherd which was prepared in connection with this litigation, which details the methodology employed and the results, which are proper and are in generally accepted valid statistical practice and procedure.

4. Based on my personal knowledge and the study conducted by me, at least for the years 1988-1991, foreign corporations in Alabama, including the Taxpayers BellSouth Companies and CSXT have been victims of discrimination in the levy and payment of corporate franchise taxes in Alabama. Based on the data furnished and the results calculated therefrom, the conclusion is inescapable that the Alabama franchise tax scheme as applied has in fact resulted in discrimination in favor of domestic corporations and to the detriment of foreign corporations, including the Taxpayers. By comparison,

during the years 1988-1991, the amount of "as if foreign" franchise tax liability calculated for a domestic corporation based on the foreign franchise tax statute is 5 times more than the domestic franchise tax actually paid by the same corporation, and the percentage of discrimination between the two is more than 400%, as shown on the table on page 2 of my study. Likewise, a comparison between the sum of the domestic franchise tax actually paid plus the domestic shares tax for each of the domestic corporations with the "as if foreign" franchise tax liability for each of the same domestic corporations demonstrates that foreign corporations pay approximately 2 times as much Alabama franchise tax as the total franchise tax plus shares tax of a domestic corporation considering the sum of both domestic franchise tax and domestic shares tax. In effect, the tax rate for these domestics taxes as domestics based on their capital employed in Alabama is approximately $1.50 versus $3.00 per $1,000 rate taxed "as if foreign."

[Notary Omitted]

EXHIBIT "A"

LARRY EARL RICHARDS
Chairman of Decision Sciences
College of Business Administration
University of Oregon
Eugene, Oregon 97403
(503) 346-3315

EDUCATION

A.A. (1960)
Lower Columbia College, Longview, Washington

B.A. (1962)
University of Washington, Seattle, Washington

MBA (1963)
University of Washington, Seattle, Washington

Ph.D. (1969)
University of California at Los Angeles,
Los Angeles, California

PROFESSIONAL EXPERIENCE

Consultant to:

1. Los Angeles County Regional Planning Commission, 1965
2. State Department of Public Health of California, 1965
3. Bank of America, 1968
4. Farwest Steel Service Center, 1970
5. Lane Plywood Inc., 1972
6. Monroe, Litton Industries, 1972

7. Simpson Timber Co., 1976
8. Pacific Power and Light, 1977, 1980
9. Federal Trade Commission, 1978
10. Portland General Electric, 1980
11. Georgia Pacific Corp., 1980
12. Stretch & Sew Inc., 1981
13. Willamette Timber Systems, 1981
14. Association of Reforestation Contractors, 1981
15. Columbia Basin Reforestation Inc., 1984
16. Oregon Department of Human Services, 1986
17. Oregon Public Utility Commission, Motor Transport Audit Division, 1986-1989
18. Oregon Public Utility Commission, Motor Transport Safety Division, 1987-1989
19. Union Pacific Railroad, 1987-1992
20. Burlington Northern Railroad, 1988-1992
21. CSX Corporation, 1992
22. Bell South Corporation, 1991-1992

PROFESSIONAL SERVICE

1. Co-Program Chairman, Western Region of the American Institute for Decision Sciences, 1974-1975.
2. Co-Program Chairman, National, the American Institute for Decision Sciences, 1977-1978.
3. Secretary-Treasurer, Oregon Chapter of the American Statistical Association, 1977-1979.
4. Vice-President, Oregon Chapter of the American Statistical Association, 1979-1981.

5. Participant as session chairman and/or discussant at the following meetings:

   a) National Decision Sciences Institute conferences

      Atlanta 1974
      Cincinnati 1975
      Chicago 1977
      St. Louis 1978
      Las Vegas 1980
      Boston 1981
      San Francisco 1982
      San Antonio 1983

   b) Western Region Decision Sciences Institute conferences
      San Francisco 1974
      Las Vegas 1975
      San Diego 1976
      Phoenix 1977
      San Diego 1978
      Reno 1979

PUBLICATIONS

1. "Refinement and Extension of Distribution-Free Discriminant Analysis," *Journal of the Royal Statistical Series C. Applied Statistics*, 1972, 21.
2. "A Note on Model Specification," *Journal of Finance and Quantitative Analysis*, VII, No. 3, 1972.
3. "Detection of Unexplained Joint Effects Through an Analysis of Residuals," *Decision Sciences*, IV, No. 1, 1973.
4. "Distribution-Free Significance Tests for Choosing Among Prediction Equations," *Decision Sciences*, VI, No. 2, 1975.

5. "Detection and Incorporation of Interactive Effects in Discriminant Analysis," *Decision Sciences*, VI, No. 3, 1975.
6. "An Efficient Algorithm for Fisher's Randomization Test," *Western Region DSI Proceedings*, 1976.
7. "Interim Inventory Valuation Strategies," *Western Region DSI Proceedings*, 1977.
8. *Business Statistics: Why and When*, with Jerry LaCava, McGraw-Hill Book Co., 1978.
9. *Study Guide/Workbook for Business Statistics: Why and When*, with Arno Rethans, McGraw-Hill Book Co., 1978.
10. "What Can Be Done About Interviewer Bias?" *Research in Marketing*, III, 1979, with Donald S. Tull.
11. "Randomization Test For Two Independent Samples Made Practical," *Western Region DSI Proceedings*, 1980.
12. *Business Statistics: Why and When*, 2nd.Edition 1983.
13. "Random Response Modeling with Responder Set Probability," *Western Region DSI Proceedings*, 1985.
14. "Multivariate Analysis of Variance," Bray & Maxwell, Book Review, *Journal of Marketing Research*, May 1987.
15. "Principal Component Analysis," I.T. Jolliffe, Book Review, *Journal of Marketing Research*, November 1988.
16. "Statistical Analysis with Missing Data," Little & Rubin, Book Review, *Journal of Marketing Review*, August 1989.
17. "Randomization Test for Two Independent Samples," *Journal of the Royal Statistical Society-Series C Applied Statistics*, to appear.

RECENT PRESENTATIONS

1. "Use and Abuse of Statistical Techniques in Taxation and Regulation" National Association of Railroad and Public Utility Tax Representatives, 1988 Annual Conference, Lake Tahoe.
2. "A Forecast of Forecasting Income—±3%" Appraisal of Utilities & Railroad Property for Ad Valorem Taxation, 1989 National Conference, Wichita.
3. "Development of Real and Personal Equalization Ratios" National Association of Railroad Property and Public Utility Tax Representatives, 1991 Annual Conference, Victoria, British Columbia.

ADMINISTRATIVE POSITIONS:

1. Chairman of the Department of Accounting and Quantitative Methods. 1974-1977.
2. Director of the Undergraduate Program, College of Business Administration. 1979-1981.
3. Director of Graduate Programs, College of Business Administration. 1981-1983.
4. Chairman of the Department of Decision Sciences. 1983-present.
5. Director of the Oregon Executive MBA Program, 1989-1991
6. Director of the Ph.D. Program. 1992-

UNIVERSITY SERVICE (Committees)

A. College of Business Administration

1. Personnel Committee, 1978-1979, 1981-1984, 1991-1992

2. Teaching Effectiveness, 1978-1980
3. Futures Committee, 1980-1981
4. MBA Committee, 1977-1978, 1981-1983
5. Ph.D. Committee, 1981-1983
6. Search Committees (nine in total)

B. University

1. University Evaluation Forms, 1976-1977
2. Evaluation of Administrators, 1977-1978
3. Committee on Statistics, 1976-1977
4. Chairman, Dean Search, 1976-1977
5. Chairman, Patent Policy Committee, 1981-1982
6. Intercollegiate Athletics Committee, 1981-1982
7. Chairman, Intercollegiate Athletics Committee, 1982-1983
8. Academic Support for Athletes, 1983-1984
9. Chairman, Committee on Statistics, 1984-present
10. Committee on Committees, 1985-1987
11. Personnel Committee, 1987-1988
12. Chairman, Personnel Committee, 1988-1989
13. Education Policy Committee 1991
14. Undergraduate Education Action Team 1991-1992
15. UO Strategic Plan Implementation Coordinating Committee 1992

RESEARCH SERVICE:

There have been 109 completed Ph.D. Dissertations in the College of Business Administration since 1972. I have

been a committee member on 61 of them, and the chairman of ten. I have also acted as consultant on perhaps fifteen additional dissertations, while not an official member of the committee.

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

[Caption Omitted]

AFFIDAVIT OF WAYNE WHITE

STATE OF ALABAMA)

JEFFERSON COUNTY)

Before me, the undersigned authority, in and for said County and State, personally appeared Wayne White, who being known to me and who being by me first duly sworn, does on his oath depose and say as follows:

1. My name is Wayne White and I am a Certified Public Accountant and a partner in the firm of Arthur Andersen & Co. located in its Birmingham, Alabama, office. I have been a practicing Certified Public Accountant in Alabama for more than 20 years and have more than 20 years of experience with Alabama state taxation of corporations, including domestic and foreign franchise taxes and corporate income tax, all of which are levied on the corporation, and ad valorem taxes imposed on the shares of capital stock owned by shareholders of domestic and foreign corporations. For more than 20 years, I have been regularly engaged by corporate clients to represent them in connection with Alabama taxation and before the Alabama Department of Revenue. Attached is a copy of my resume which is incorporated herein by reference. I make this affidavit from personal knowledge of the facts set forth herein for use in Opposition to the Motion for Summary Judgment filed on behalf of the State and the Commissioner of Revenue.

2. During the course of my practice as a Certified Public Accountant in Alabama, I have worked extensively with Alabama state taxation of corporations, including, specifically, Alabama domestic and foreign franchise taxation. Based on this experience and my expertise, I am of the opinion that the Alabama franchise scheme discriminates in favor of domestic corporations incorporated under the laws of Alabama to the detriment of foreign corporations incorporated under the laws of other states which do business in Alabama.

3. Discrimination in favor of domestic corporations results primarily from discriminatory differential in the tax base. By statute, the franchise tax is levied on domestic corporations under Ala. Code 1975, § 40-14-40 "based on its capital stock." To the best of my knowledge, the Alabama Legislature has provided no further definition nor guidelines upon which to determine the tax base. The Alabama Department of Revenue has, without any statutory basis, utilized and applied "par value" of capital stock as the domestic franchise tax base without legislative definition, standards or direction. In the case of "no-par stock," the domestic franchise tax base is determined at the date the stock is issued.

Domestic franchise taxes are, without any statutory basis, levied on a tax base of the "par value" of the capital stock of a domestic corporation, except where the stock is no-par. "Par value" has no relationship to the actual value of the corporation's capital stock. Domestic corporations can arbitrarily set and reduce the par value of their capital stock. It is my understanding that under Alabama corporate law, Alabama no longer has a minimum capital requirement, and shares may have any par value or no par value of the corporation's capital stock. Domestic corporarespect to "no-par stock," stock is valued at the date of issuance based upon consideration paid for the stock. Ala. Code 1975, § 40-14-23. However, a "no-par stock" corporation could be recapitalized utilizing "par stock" to

replace the "no-par stock" to reduce domestic franchise taxes.

By contrast, foreign franchise taxes are levied under Ala. Code 1975, § 40-14-41, on a tax base of "the actual amount of capital employed in this state," consisting of the real or actual value of the corporation's capital stock, including surplus and retained earnings plus long-term debt, certain related-party debt and accelerated depreciation. Without any inclusion within the statute, the Department of Revenue has added an additional component to "capital employed" by requiring the inclusion of "deferred taxes" within the total capital of a foreign corporation.

Thus, by virtue of the difference in the tax base, domestic corporations are undertaxed based on the improper application of the domestic franchise tax statute resulting in foreign corporations paying their unfair share of the Alabama franchise tax burden.

4. Based upon my understanding of the domestic franchise tax, "par value" has never been the standard adopted by the Alabama Legislature in the taxing statute. There was no domestic franchise tax prior to the early 1900s when the Legislature enacted a domestic franchise tax statute which defined the tax base as "paid-up" capital stock. This standard remained until 1935 when the statute was changed to levy the tax "based on its capital stock" which tax base has remained in effect until the present time. "Paid-up" capital stock is not the equivalent of par value of capital stock. "Paid-up" capital stock includes all of the consideration paid by the subscriber to the capital stock, including capital surplus. "Par value" by definition excludes capital surplus. The use of "par value" as a tax base for domestic franchise tax in itself is an arbitrary use of a fictional value rather than the real or actual value of capital stock. The use of "par value" as a tax base fails to account for the real value of the capital stock in a going concern. Moreover, under Alabama

corporate law, par value may be changed at any time by the corporation so as to decrease the par value of the capital stock. By decreasing the par value of the capital stock, a domestic corporation incorporated under the laws of Alabama may decrease or reduce its Alabama domestic franchise tax liability to the minimum tax of $50. In the event the domestic corporation is organized without "par value" capital stock, then pursuant to a recent amendment of Ala. Code 1975, § 40-14-23, valuation at the date of stock is issued is required. This likewise may be an entirely fictional amount having no relationship to the value of the domestic corporation's capital stock as a going concern after the passage of time. As previously indicated, "par value" is a fictional figure which may be arbitrarily set by the incorporators, which may not at the time of incorporation, and does not at any time after business commences, represent the real value of the capital stock or capitalization of domestic corporations. "Par value" may be arbitrarily reduced by the corporations at any time. Additionally, even in the case of "no-par stock," its initial issuance may have little relationship to its actual value.

5. Under Alabama statutory scheme, foreign but not domestic corporations incur increased franchise tax liabilities as they earn and retain income or increase indebtedness. Moreover, under Department's misapplication of "capital stock" by the arbitrary use of "par value," domestic corporations can unilaterally lower their franchise taxes either by establishing a low par value upon incorporation or by later reducing par value. Changes in "par value" for foreign corporations have no effect on the foreign franchise tax base or the foreign franchise tax liability.

6. In the practice of my profession, I have had the opportunity to represent and advise many corporations concerning Alabama franchise tax liability, both prior to incorporation and after incorporation. Based on my ob-

servations and, in some cases, my advice, most newly incorporated Alabama domestic corporations that I have worked with have utilized a minimal arbitrary "par value" to minimize domestic franchise tax liability. Likewise, existing corporations have changed the par value of their capital stock to minimize domestic franchise tax liability. Foreign corporations have been advised to and have incorporated under Alabama law a wholly owned domestic subsidiary with a minimal par value to minimize the total franchise tax liability. Utilizing this strategy, the domestic subsidiary may have limited its domestic franchise tax burden to the minimum amount (or a substantially decreased amount), while the parent foreign corporation is provided an exclusion from its tax base of the actual amount of its investment in the capital of other corporations organized under the Alabama laws. Thus, to induce incorporation under the laws of the State of Alabama, the Alabama franchise tax scheme provides tax incentives, which result in discrimination in favor of those corporations incorporating under Alabama laws to the detriment of and imposing a higher tax burden on foreign corporations solely on the basis of the state of incorporation.

7. In connection with advising corporations with respect to state taxation, I am familiar with and have prepared or had prepared under my direction numerous tax returns on the domestic shares tax imposed pursuant to Ala. Code 1975, §§ 40-14-70, et seq. This domestic shares tax is imposed solely on the shareholders of the corporation and not on the corporation. Section 40-14-70 provides specifically that "every share of any domestic corporation [with exceptions] shall be assessed and the taxes thereon collected in the county wherein such corporation has its home or principal office in the state and shall be assessed at twenty percent of its value to the person in whose name such shares stand on the books of the corporation and not to the corporation." Ala. Code 1975, § 40-14-73 permits the domestic corporation as a

volunteer to pay the shares tax imposed upon its shareholders, and the domestic shares tax return has a consent form to be executed by an officer of the domestic corporation agreeing to pay the tax. The domestic shares tax is levied as an ad valorem tax on the shares of capital stock, which are the property of the shareholders, and not of the corporation. The taxable event is the ownership of the shares of stock based on their value. The domestic and foreign franchise taxes are not ad valorem taxes, but are excise taxes for the privilege of corporate existence for domestic corporations and of doing business in Alabama for foreign corporations. The capital stock account on the books of the corporation is the property of the corporation—its capital account—to which the shareholders have no entitlement (except possibly on dissolution) while the shares of capital stock is the property of the shareholders to which the corporation has no claim. The taxable event or incident in the case of the franchise taxes is the incorporation in Alabama or the qualifying to do business in Alabama. Thus, the domestic shares tax is not comparable to the Alabama franchise taxes because taxes are levied on different persons (corporation versus shareholders), on a different tax base (capital stock versus shares of capital stock) and on a distinct taxable event (privilege tax or incorporation or doing business versus ad valorem tax on the value of property).

The domestic shares tax should not be considered as a part of the domestic corporation's tax burden nor as complementary to the franchise tax. Even if the shares tax is paid by the domestic corporation, the combined tax burden of the domestic franchise tax and domestic shares tax in my opinion and as shown by the study performed by Dr. Larry Richards is less than the average tax burden borne by the same corporation taxed as if it is a foreign corporation. I have reviewed the study performed by Dr. Richards and the methodology set forth in the affidavit of Adele Shepherd, and believe that the methodology

and study are reasonable and in my opinion reasonably reflect the computation of the "as if foreign" franchise tax liability for domestic corporations in Alabama, including the use of property factor for allocating "capital employed in Alabama." Based upon my years of experience in the Alabama franchise tax field and dealing with domestic shares taxation, the results of Dr. Richards' study confirm my own analysis and opinion that the Alabama franchise tax scheme discriminates in favor of domestic corporations and to the detriment of foreign corporations.

8. The Alabama domestic shares tax is complementary to the ad valorem tax imposed upon the shareholder/owner of the shares of capital stock in foreign corporations levied pursuant to Ala. Code 1975, § 40-11-1(9), which provides that the subjects of taxation shall be:

> "(9) Shares in corporations or associations, not incorporated under the laws of this state, except stock in national banks . . . ."

The domestic shares tax and the ad valorem tax on foreign shares each is imposed upon the shareholder/owner of the shares of stock; each is an ad valorem tax based on taxable incident of ownership on the same return date —October 1—and at the same taxable assessed value of twenty percent. Thus, under Alabama law, the same ad valorem tax, the same assessed value and at the same tax rate (although appearing in separate sections of the Code) is levied against shares of capital stock of domestic and foreign corporations.

9. Under the Alabama statutes, the tax base for the domestic shares tax is different from the tax base for the foreign franchise tax. The tax base for the foreign franchise tax return includes not just the value of the outstanding capital stock, including surplus and undivided profits, but also includes long-term debt, certain related-

party debt and accelerated depreciation by statute and deferred taxes by order of the Department of Revenue. The domestic shares tax base includes only the value of the shares of capital stock, not the capital account in the corporation and not any of the debt, accelerated depreciation or deferred taxes accounts. The domestic shares tax statute permits the deduction of the book value of all real and tangible personal property owned in other states and of inventory held for sale, among other deductions, before making a determination of the assessed value of the shares of stock. From the assessed value of all the shares the assessed value of all the taxable real and tangible personal property owned and assessed and on which taxes are paid by the corporation in Alabama are deducted. If the aggregate assessed value of the shares does not exceed the aggregate assessed value of real and tangible personal property of the corporation, then no tax is due. Thus, the only remainder of value of the shares of stock results from the value of intangible personal property, if any, because all real and tangible personal property, including inventory wherever located, is deducted from the shares tax base. Further, the purchase of short-term U.S. Government obligations at the end of a fiscal year could effectively eliminate any remainder being subject to tax.

/s/ Wayne White
WAYNE WHITE

[Notary Omitted]

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR MONTGOMERY COUNTY
MONTGOMERY, ALABAMA

[Caption Omitted]

COURT REPORTER'S TRANSCRIPT OF PROCEEDINGS

December 14, 1994

Before: THE HONORABLE WILLIAM R. GORDON
CIRCUIT JUDGE

* * * *

[43] DIRECT EXAMINATION
OF ERNEST BROADHEAD

* * * *

[49] Q. Actually with regard to your study that you did in 1993—'83, excuse me, '83, that was the predecessor to this particular legislation, did you not determine that the foreign corporations paid eight times as much franchise tax as the domestics paid in franchise and shares tax?

A. That would be correct.

Q. Now, in calculating the calculation we are just talking about in your 1983 study, did you use an allocation factor in computing an "as if" foreign franchise tax liability?

A. No.

Q. You did not?

A. That's correct.

Q. Did you not use a 100 percent allocation assuming that all those corporations were domestic and had all of their [50] property in the state of Alabama?

A. I believe that was the case on that particular study. On another study, we tried something a little different.

Q. Right. But in that particular study was eight times as large, but you assumed that all of the property in the property allocation factor was Alabama property. So the factor you used was actually one hundred?

A. That's correct.

Q. Now, that was criticized. And the only reason I believe your study was criticized by the Alabama Supreme Court in *Reynolds* was because you assumed the 100 percent factor; is that correct?

A. That's correct.

Q. Now, if we divided that factor by two, which would mean an allocation factor of 50 percent, would it not still be a four to one ratio discriminating against foreign corporations?

A. There would be a four to one ratio, yes, sir.

Q. And that would mean the foreign corporations pay four times as much franchise tax as the domestics did, franchise and shares tax; is that correct?

A. That would seem to follow.

Q. And if we want to go down to a 25 percent factor, it would be two to one, would it not?

A. That's correct.

[51] Q. Do you consider the property factor as a true and accurate allocation factor and one that is commonly used by the Department?

A. The property factor alone?

Q. I'm asking, yeah, the property factor alone right now.

A. That would not in all cases reflect an accurate picture, no.

Q. But it is a factor that you commonly use and is required to be used by most corporations in Alabama as one of the factors?

A. As one of the factors, yes.

Q. And I believe that you have testified before that it is a valid factor to consider when you don't have other factors available to you; is that correct?

A. Yes.

THE COURT: I don't know the record is real clear on what y'all are talking about.

MR. BYARS: All right.

Q. In connection with the calculation of the foreign corporation franchise tax, as I understand the statute and the procedure of the Department, the Department has the elements of the tax base set forth in 40-14-41 which are outstanding—its capital stock outstanding?

A. Yes.

Q. And then adding to that would be surplus and retained earnings?

[52] A. Yes.

Q. And adding to that would be a long-term debt being debt over one year?

A. Correct.

Q. And added to that would be related party debt, and that's certain parties and corporations that own certain shares?

A. Intercompany debt.

Q. Intercompany debt. And lastly in the statute you have accelerated depreciation?

A. Yes.

Q. And all of these fit into the foreign corporation basic tax base; is that correct?

A. To determine the total capital employed everywhere.

Q. Correct?

A. Yes, sir.

Q. And then under the Section 232 of the constitution and also under 40-14-41 the levying statute, there is a way to allocate to Alabama the property that is employed or the capital that is employed in Alabama?

A. Yes.

Q. And that's what we are talking about in the allocation factor?

A. Yes.

Q. Is how much is actually allocated to Alabama?

A. That's correct.

[53] Q. And this is selected by certain factors; is that correct?

A. Yes.

Q. So the allocation factors we were talking about, property is the principal one for all corporations, is it not?

A. Property, I believe, will always be one of the factors.

Q. So if we assumed a 50 percent property factor, that is, half of its property is in Alabama and half is outside of Alabama, on the eight to one ratio you had, would that then reduce the ratio of discrimination between foreigns and domestics four to one?

A. Yes.

Q. And if you lowered it to 25 percent in Alabama, 75 percent outside, it would lower it still two to one to the detriment of the foreign corporations; is that correct?

A. That's correct.

Q. And that is a comparison of foreign franchise tax solely versus a combined tax burden of the domestic shares tax and the domestic franchise tax; is that correct?

A. That's correct.

Q. In that study did you not use what we call the "as if" foreign corporation approach whereby you took a domestic corporation and took that same corporation and assumed it to be taxed under the foreign statute?

A. Yes.

Q. And that would be the exact same corporation, would it not?

[54] A. Yes.

Q. The exact same size?

A. Yes.

Q. The exact corporate makeup?

A. Yes.

Q. And in all respects it is the identical corporation?

A. Yes.

Q. It would be, if I may, a comparison is if you found a foreign that was identical to the domestic and

taxed one under the domestic law and the other one under the foreign law; is that correct?

A. That's correct.

* * * *

[55] [Q.] Now, in 1988 did you perform another study or studies?

A. Yes.

Q. And what was this in connection with?

A. An attempt to—another attempt to place the two taxes on an equal footing. The two taxes meaning foreign and domestic franchise taxes. This was done in conjunction with the special legislative session. I believe that was in 1989.

Q. Okay.

A. You said '88.

Q. Forgive me. I will amend it. It was either '88 or '89.

A. You meant the '89 special session?

Q. Yes.

A. That was in 1989, I believe.

Q. All right. It was during the first year of the Hunt administration, was it not or was it?

[56] A. I'm not sure.

Q. Wasn't Mr. Sizemore the Director or Commissioner of Revenue?

A. Wait. I'm confused.

Q. May not be. I'm trying to relate it to time.

A. The Supreme Court ruled on the question, I believe it was, in December 1989. We were in the—the legislature was in session when the Court ruled. And I believe that was in 1989, if that's the period that you are referring to.

Q. Okay. All right. In connection with that session of the legislature, did not the Department send out a questionnaire to the franchise taxpayers, both foreign and domestic, and the domestic franchise taxpayers, as well as

other taxes, seeking their advice and what they really wanted in the taxes?

A. Yes, sir. That was something that was conducted by the Commissioner of Revenue.

* * * *

[58] Q. And I will ask you if Plaintiff's Exhibit 11 is not more information that is accumulated there in that spreadsheet which was Exhibit 9, and there you would pick up the unallocated capital, the allocation percentage or factor and the actual amount of domestic franchise tax paid, permit fee paid, and license and permit fee paid for each of those ninety-nine corporations; is that correct?

A. That appears to be the case. Now, it would not be the same—it would not be for the exact same worksheet because the columns are going to be different. But it was not necessarily from the same worksheet but part of the same [59] study, yes.

Q. But it's the same corporations by number, and it is then assembled later on Plaintiff's Exhibit 9, putting the two together; is that correct?

A. Yes, it is part of the—the corporations would be the same.

Q. All right. I will show you Plaintiff's Exhibit 12 which says those same corporations and says the allocation percentages. Were those the actual allocation percentages determined for each of the ninety-nine sample corporations?

You will note they are still numbered 301 through whatever the final number is.

A. Yes.

THE COURT: Mr. Broadhead, which of the studies are we talking about, 1983 or 1989?

THE WITNESS: These are all 1989, Judge Gordon.

THE COURT: Thank you.

Q. I will show you Plaintiff's Exhibit 13 which is a recap of the figures, I believe, that are contained in each of those foregoing Exhibits 9, 10, 11 and 12. I didn't

say you prepared that. But do you see that to be a recap of all of those saying the capital stock par value, your unallocated, the allocation percentages, those same factors? And you can check them to see that they—

A. There is—let me explain something. We developed a base [60] using the same corporations. Then we tried various and sundry different approaches and different proposals. When you ask do all of these particular spreadsheets, do they all tie together exactly, I cannot confirm that. I can say it comes from the same study. There is—it could have been that some of these segments could have been from house bill 16 or house bill 14 or house bill 12 where we used the same base to do—set up different "what if" analysis. And I wanted to clarify that before we get too—

Q. Right. But they are the same corporations? All the numbers are the same?

A. Yes, sir. All the same corporations as long as they have the same number. Because we numbered all of the corporations and kept the identity of that particular corporation secret.

Q. So the identity contained on each of those exhibits, same numbers, those are the same corporations?

A. That's correct, yes.

Q. Does this appear, and this being Plaintiff's Exhibit 13, appear to be a spreadsheet that uses those same corporations subject to your verification of the numbers?

A. Yes, sir.

Q. Their same par values, their same unallocated capital employed and their allocation percentages for the capital?

A. Yes, sir.

[61] Q. And the calculation of franchise permits, shares tax, license and permit and a total tax column for the domestic corporation?

A. Yes.

Q. Does it then contain an "as if" foreign calculation for those same corporations using that allocation factor?

A. Yes.

Q. And if you would, look on the final page of all these ninety-nine that were in your sample and tell us what the total franchise tax would be for all ninety-nine corporations as a domestic corporation?

A. $61,147.00.

Q. And the total amount of shares taxed for those same corporations?

A. $284,630.00.

Q. What is the amount of the "as if" franchise tax calculated for those same corporations, "as if" foreign that is?

A. $7,690,108.00.

Q. And what is the difference in the amount of tax they would have paid as "as if" foreign corporations and domestic corporations?

A. $7,344,331.00.

Q. Would you assume this? Does it look to you, and I know you don't have a calculator, that that's about twenty-two to one?

[62] A. Yes.

Q. The foreigns paid twenty-two times as much tax as the combined domestic franchise and shares tax?

A. Yes.

Q. And this was on the basis of "as if" foreign calculations on the same domestic corporations?

A. That's correct.

* * * *

[80] Q. Very well. Can a domestic corporation at the time of incorporation in Alabama minimize its domestic franchise tax by having a par value that would place it under the level of five thousand dollars?

A. Yes, sir.

Q. Later after it is incorporated, if it is incorporated for more money than that, can it amend at its own whim,

so to speak, its own decision to decrease the amount of par value of its capital stock to one cent if it so desires?

A. Yes.

Q. And would that minimize its domestic franchise tax to the very minimum of fifty dollars in Alabama?

A. Yes, sir.

Q. Can a foreign corporation by manipulation of its own capital structure in any way reduce the amount of its foreign franchise tax?

A. Not by manipulation of its capital structure except through investments, whatever. There are some possibilities.

[81] Q. Okay. With regard to that, and I don't know what you're talking about, can it invest in government securities and reduce its franchise tax?

A. If it invests in industrial development bonds, it can get an exclusion.

Q. That is a specific exclusion within the statute?

A. Yes.

Q. But that would require that it make a particular investment in Alabama industrial development bonds; is that not correct?

A. That's correct.

Q. Any other way you know of that it can minimize at all its tax or reduce its tax by manipulation?

A. There are the investment areas investing in, for instance, a subsidiary corporation that's operating exclusively outside the state of Alabama would be—there again, this is a way to reduce the franchise tax base.

Q. What is that? By incorporating a subsidiary in Alabama; is that what you are saying?

A. If a corporation owns a subsidiary that's operating exclusively outside of Alabama, then that would be an exclusion from the tax base. There are a number of exclusions from the tax base. I'm not sure that I'm—

Q. That would be just property not devoted or utilized or used in Alabama or employed in Alabama by

the—if it were [82] invested outside of Alabama, then it could not be capital employed in Alabama, could it?

A. That's right.

Q. So whether it is invested another corporation or one of its own subsidiaries, if it is invested out of Alabama, it is not capital employed in this state?

A. If you are asking can they play around with the par value of the stock and impact the franchise tax, no, they cannot.

Q. They can't play around with their stock at all, whether it be par value, and influence the franchise tax?

A. That's correct, yes.

* * * *

[84] Q. All right. Have you ever conducted or performed a study whereby you compared the domestic franchise tax burden of domestic corporations in Alabama and the foreign franchise tax burdens of either those same domestic corporations calculated "as if" foreign or foreign corporations that would indicate that the franchise tax burden of the domestic [85] corporation was less than the franchise tax burden of the foreign corporation?

A. On an "as if" foreign. I have seen numerous instances, Mr. Byars, where if you—

Q. Study is my key word as opposed to an individual calculation.

A. No. Okay. No.

Q. All right. There are some instances where a domestic would pay less tax as an "as if" foreign corporation?

A. Yes.

Q. But as a study where you drew a sample, you have never seen it where the sample would indicate that domestic corporations pay less than foreign corporations in franchise taxes?

A. If you use the—if you use the foreign franchise tax procedure.

Q. Correct. Okay.

A. I can't remember that occurring.

* * * *

[86] CROSS-EXAMINATION
OF ERNEST BROADHEAD

Q. Mr. Broadhead, can a foreign corporation manipulate its franchise tax liability by setting up Alabama subsidiaries?

A. Yes.

Q. And does that occur in the real world?

A. Yes, it does.

Q. And you have run into that quite often in your administration with the franchise tax?

A. Yes.

* * * *

[88] Q. Okay. I will show you State's Exhibit Number 1. Is this that study?

A. Yes.

Q. Was that study prepared under your supervision and at your direction?

A. Yes.

Q. Would you tell the Court what data that study was based on?

A. All of the information that went into this study came from foreign franchise tax returns filed by the taxpayers.

Q. All right. And so all the information that was used in that study was provided to the Department by the taxpayers themselves?

A. That's correct.

Q. Generally speaking, what did that study show?

A. That if these corporations had been filing as domestic corporations, they would have paid drastically more taxes to [89] the State of Alabama.

Q. Mr. Broadhead, I direct your attention to page 1 of the study where it lists BellSouth Telecommunications.

A. Okay.

Q. Would you tell the Court, please, how much BellSouth Telecommunications paid in foreign franchise taxes in the year 1991?

A. Twenty-five dollars.

Q. And what did your study show they would have paid had they been a domestic corporation?

A. $42,946,058.00.

Q. All right. Take the year '92. What did the BellSouth Telecommunications, Inc., pay in foreign franchise taxes?

A. $6,371,607.00.

Q. What would they have paid had they been domestic corporations?

A. $73,189,591.00.

Q. All right. That's a difference of how much?

A. $66,817,984.00.

Q. So they would have paid 66 million dollars more if they had been domestic corporations than they have actually paid?

A. That's correct.

Q. Let's go down and take BellSouth Corporation, another named plaintiff. In the year 1986 what did that corporation pay in foreign franchise taxes?

[90] A. Twenty-five dollars.

Q. And what would they have paid had they been a foreign—had they been paying as a domestic corporation in domestic franchise taxes?

A. $3,097,780.00.

Q. How much shares tax would they have paid?

A. $5,307,201.00.

Q. So the total domestic corporation tax they would have paid would have been what?

A. $8,404,981.00.

Q. So 8.4 million instead of $25.00?

A. Can I round these million-dollar numbers off or do you want them exact?

Q. You can round them off as far as I'm concerned if it is all right with Mr. Byars.

MR. BYARS: Sure, no problem.

A. It will save some time.

Q. And these numbers pretty much go through right on for the next few years for BellSouth Corporation?

A. Yes, sir. The highest—

Q. Go ahead.

A. The highest amount paid by BellSouth Corporation for foreign franchise tax was $5,300.00 in 1992, in which case—in which year they would have paid domestic franchise tax of 4.8 million, domestic shares tax of 24.3 million, for a [91] total domestic tax of 29.2 million for a difference of 29.1 million that they would have paid in addition to what they did pay had they been a domestic corporation.

Q. Okay. Your study included figures for that corporation from 1986 through 1992; is that correct?

A. Yes, sir.

Q. What's the total difference that—more that they would have paid had they been domestic over and above what they actually paid as a foreign corporation?

A. 513.4 million.

Q. Let's go to the next one on the list here. South Central Bell Telephone Company, there are figures here for 1986. What would South Central Bell have paid in foreign—I mean, what did they pay in foreign franchise taxes?

A. 4.9 million.

Q. What would they have paid had they been filing as a domestic corporation?

A. They would have paid 29.3 million.

Q. All right. Take 1987, what did they pay?

A. 4.9—actually it would round to five million.

Q. All right. What would they have paid in domestic tax had they been filing as a domestic corporation?

A. Twenty-nine and a half million.

Q. Do those figures pretty much hold true all the way up through 1991?

[92] A. Yes, through 1991.

Q. From 1986 through '92, what's the total difference?
A. 148.1 million.
Q. That's 148.1 million dollars more that they would have paid as domestics than they actually paid as foreigns?
A. Yes, sir.
Q. All right. Take BellSouth Services, Inc., what did they actually pay in foreign franchise taxes in 1986?
A. $30,950.00.
Q. What would they have paid had they been filing as domestic?
A. $340,000.00.
Q. All right. Go on to BellSouth Financial Services, take the year 1990, let's say, what did they actually pay?
A. $16,908.00.
Q. What would they have paid as a domestic corporation?
A. $39,700.00.
Q. For a total difference of 22.7?
A. Yes.
Q. All right. What's the total? You have got 1986 through 1992 listed compared here for them. What was the total if you added all those years up? What did they pay in actual foreign corporation franchise taxes.
A. $193,028.00.
Q. What would they have paid had they been filing as domestic corporations?
[93] A. $334,965.00.
Q. And that means that they would have paid, if they were domestics, $141,937.00 more?
A. Yes.
Q. Is that right?
A. Yes.
Q. Let's take a look at BellSouth Advertising and Publishing Company, another of the BellSouth Companies. In the year 1986 what was their franchise tax payment to the State?
A. $60,038.00.

Q. And according to your computations, what would they have paid had they been filing as a domestic corporation?
A. Four point two million.
Q. And that 4.2 million includes the franchise and shares tax; is that right?
A. Yes.
Q. What would just the franchise tax have been?
A. One point eight million.
Q. All right. Let's go to the total for this company again. How much in total foreign corporation franchise taxes did they pay for the year 1986 through '92?
A. $445,316.00.
Q. What would this company have paid if they had been filing as a domestic company?
A. Twenty-four million dollars.
[94] Q. All right. BellSouth Resources, Inc., is another one. Go to the total. They evidently had no figures for '86, '87 and '88. Go to the total column for the years '89 through '92. What did they actually pay?
A. $7,608.00.
Q. What would they have paid as a domestic corporation?
A. Eighty-six point eight thousand dollars.
Q. Okay. For a total difference of $79,280.00?
A. That's correct.
Q. BellSouth Products, Inc. Let's go to the total on them. What did they actually pay?
A. $3,172.00.
Q. And what would they have paid as a domestic?
A. For the entire period they would have paid $100.00.
Q. You only computed the years '91 and '92 for this company, though, right?
A. That's correct, yes.
Q. So that's the only one so far that we have seen where the totals would be less as a foreign—more as a foreign than as a domestic?
A. They would have paid less as a domestic.

Q. By about three thousand dollars?
A. Yes.
Q. Go to Alabama Cellular Services, Inc. The total for them—what was their total foreign tax?
[95] A. $304,268.00.
Q. And what would they have paid as a domestic?
A. $265,028.00.
Q. All right. This is for the years 1986 through '92?
A. Yes.
Q. So they would have paid $39,000.00 less as a domestic?
A. Less as a domestic, yes.
Q. How about Sunlink Corporation? You computed figures for them for '86 through '92 also.
A. Yes.
Q. How much did they pay in total foreign corporation franchise taxes?
A. Total payment was $108,000.00.
Q. What would they have paid as domestics?
A. $169,000.00.
Q. So they would have paid as a domestic about $60,000.00 more in taxes; is that correct?
A. Yes, they would have paid more as a domestic.
Q. Let's go to TechSouth, Inc. You had figures that you computed for 1986 through 1992 for that corporation also?
A. Yes.
Q. What was the total amount of foreign corporation franchise taxes they paid for that period of time?
A. $22,974.00.
Q. And what would they have paid in domestic taxes?
[96] A. $47,733.00.
Q. And what's the difference?
A. They would have owed more by about $25,000.00 had they been domestic.
Q. All right. CSX Transportation, Inc., another named plaintiff, did you compute the figures for them as if domestic 1986 through 1992 also?
A. Yes.

Q. Let's just go to the total on them also. What did they pay in foreign corporation franchise taxes for that period.
A. Three point nine million.
Q. What would they have paid had they been filing as domestic corporations in Alabama?
A. Fourteen point one million. I'm sorry. That's correct, yes, sir.
Q. All these figures were taken from franchise tax returns that these taxes were filed with the Department; is that correct?
A. That's correct.

* * * *

[96] REDIRECT EXAMINATION
OF ERNEST BROADHEAD

[97] Q. Mr. Broadhead, are all of the Bell Companies Georgia corporations or do you know?
A. I just know they are foreign.
Q. Well, if I represent to you that they are all Georgia corporations and that Georgia has a par value statute that says it will be one cent per share, would all of your domestic franchise tax calculations be incorrect?
A. I don't—no, I wouldn't agree to that.
Q. What if it is one cent par value, and you have one share? What is the tax? I asked you that earlier.
A. If the par value is actually one cent?
Q. Yeah.
A. Then, yes, I would have to assume that the numbers that were recorded on these returns are wrong, and we used incorrect information.

* * * *

[106] RECROSS-EXAMINATION
OF ERNEST BROADHEAD

Q. Mr. Broadhead, is there a line on the Schedule "A" of the Alabama franchise tax return on which a corporation is allowed to put the value of its common and preferred stock? Is that line 14? Turn to page 2.

A. Yes. Yes, I have got you now.

Q. And did you base your figures on your study on what the plaintiffs in this case listed in that line as their value of their common preferred stock?

A. Yes.

MR. BOWDEN: That's all, Your Honor.

FURTHER REDIRECT EXAMINATION
OF ERNEST BROADHEAD

[107] Q. That figure that is put on there is the book value, is it not, as opposed to the par value? I didn't hear your answer.

A. Oh, was that a question?

Q. Yes. That's book value rather than par value?

A. I don't know what it is. It is just a number on a tax return filed by the taxpayer, Mr. Byars. I don't know.

Q. What does the item say?

A. Pardon?

Q. Is it in the balance sheet?

A. Yes, sir.

Q. In the balance sheet you normally give the book value of your stock, do you not?

A. Yes, sir.

* * * *

[129] DIRECT EXAMINATION
OF ADELE HOWELL SHEPHERD

* * * *

[132] Q. Ms. Shepherd are you aware of the operations of the BeliSouth Companies that are parties to this?

A. I am.

Q. Are you also aware of the Alabama franchise tax returns of all the BellSouth taxpayers who are litigants in this litigation?

[133] A. I am.

Q. And with respect to each of these companies, where are they incorporated or where is it incorporated?

A. Each of the companies that's a party to this litigation is incorporated in Georgia. It's qualified to do business in Alabama and operate in interstate commerce.

Q. All right. I'm going to name them by name as we go now. We have said that generically. But with regard to each of these, would you describe the capital structure of the corporations?

A. I will.

Q. All right. With BellSouth Products?

A. BellSouth Products has one common share authorized, one common share issued. It has a stated value at $500.00.

Q. No-par stock?

A. No-par stock.

Q. BellSouth Resources?

A. BellSouth Resources has one common share authorized, one common share issued, no-par stock. It has a stated value of $500.00.

Q. Alabama Cellular?

A. Alabama Cellular has one share common authorized, one share common issued, no-par stock with a stated value of $500.00.

Q. Sunlink?

A. Sunlink has 1,000 shares common authorized, one share [134] issued. It is non-par stock. It has a stated value of $500.00.

Q. BellSouth Advertising and Publishing Corporation?

A. BellSouth Advertising and Publishing Corporation has 1,000 shares common authorized, 913 shares issued. It has a no-par stock. For Alabama franchise tax purposes, it would have one penny par.

Q. All right. What would the total par value be of all the shares of stock?

A. $9.13.

Q. What about BellSouth Financial Services?

A. BellSouth Financial Services has 1,000 shares common authorized, one share issued. It has a stated value of $500.00. It is a no-par stock.

Q. What about TechSouth?

A. TechSouth has 100,000 shares common authorized, 98,000 shares issued. It has no stated value. For Alabama franchise tax purposes, each share has a penny value par.

Q. What's the total par value of that?

A. $980.00.

Q. How about BellSouth Services?

A. BellSouth Services had two shares of common authorized, two shares issued. It was no-par value stock. It has a stated value of $500.00.

Q. BellSouth Telecommunications?

[135] A. BellSouth Telecommunications has one common share authorized, one common share issued. It has no stated value. For Alabama franchise tax purposes, the par value is one penny.

Q. With regard to South Central Bell, which was its predecessor, what was its capital structure as long as it was a separate corporation?

A. It has one share common authorized, one share common issued. It had no stated value. For Alabama franchise tax purposes, that one share had par value of one penny.

Q. With regard to each of these that you have talked about, what would have been the Alabama domestic franchise tax if it had been taxed as a domestic?

A. Fifty dollars.

Q. Each?

A. Each.

Q. What was the BellSouth Corporation's financials?

A. BellSouth Corporation has 1.1 billion shares authorized, 498 million shares outstanding, and it has a par value of one dollar.

Q. If it were incorporated as a domestic in Alabama, would it have the option of lowering that par value to one cent or even less?

A. It would.

* * * *

[161] CROSS-EXAMINATION
OF ADELE HOWELL SHEPHERD

* * * *

[163] Q. Which of the BellSouth Companies are publics that traded, Ms. Shepherd?

A. BellSouth Corporation.

[164] Q. Is that the only one?

A. That is the only one.

Q. Okay. And what did you state was—I believe you stated that there were 498 million shares?

A. Outstanding.

Q. At a par value of a dollar a share?

A. That's correct.

Q. Do you know what the outstanding shares of South Central Bell Telephone Company are?

A. South Central Bell Company was merged with BellSouth Telecommunications 12-31-91. Do you want the 12-31-91 number before merger or do you want the CSXT number?

Q. Give me the combined number for BellSouth Telecommunications.

A. BellSouth Telecommunications has one common share authorized, one common share issued. For Alabama franchise tax purposes that one share has par value of a penny.

Q. What do you base your statement that it has a par value of a penny on?

A. Georgia is a no-par state. All of these corporations are incorporated in Georgia. The Georgia corporation law has a provision, which Mr. Byars referenced earlier, that says—that addresses what the par value is for tax purposes if one is needed for no-par stock for Georgia corporations.

Q. All right.

[165] A. Would you like for me to read it?

Q. No, that won't be necessary. Do you know whether Alabama has that same provision in its law?

A. Georgia corporations, I would think, would be governed by Georgia corporation law. I'm not familiar—

Q. That wasn't my question. I'm sorry.

A. I don't know about the Alabama corporation law.

Q. Okay. If BellSouth Telecommunications was incorporated in Alabama, assuming Alabama didn't have that provision in its law, then no such provision would apply, would it?

A. If BellSouth Telecommunications were incorporated in Alabama, it would be incorporated with a low-par value, and it wouldn't need that provision.

MR. BOWDEN: Well, let me have a copy of BellSouth Telecommunications.

MR. BYARS: You meant BellSouth Corporation?

THE WITNESS: No, he is asking about Telecommunications.

Q. Ms. Shepherd, I'm holding in my hand a copy of the Alabama foreign corporation franchise tax filed by BellSouth Telecommunications for 1992. Did you prepare this?

A. I did not.

Q. Would you take a look at that? And if I represent to you that's the original, would you dispute that?

A. I don't think I dispute it. It looks original to me.

[166] Q. On page 3 under franchise tax and permit fee computation, there is a line one that says outstanding capital stock. Would you read that number for me—for the Court, please?

A. It's $7,318,959,147.00.

Q. All right. Awhile ago you stated that there was one share with a par value of what?

A. One penny.

Q. All right. And that's based on Georgia law.

A. That's based on Georgia corporation law.

Q. But when you reported this outstanding capital stock to Alabama on your foreign return, you reported $7,318,959,147.00. of outstanding capital stock; is that correct?

A. That's what we reported in the capital stock account.

Q. All right. You have stated before that you have in the past prepared foreign corporation franchise tax returns for Alabama; is that correct?

A. That's correct.

Q. Are you not aware that this line that you have just read from is the line on which you're suppose to report the par value of your stock?

A. There is no instruction on that line that says par value. We would report on that line what is in our capital stock account on our books.

Q. All right. Is that—what would that represent?

[167] A. That would represent what was in the capital stock account on the books.

Q. What does the capital stock account on the books represent? Is that the stated value of your stock?

A. It is not stated value because there is no stated value.

Q. Is it market value?

A. It is not market value.

Q. Well, it is a number, and it is 7.3 billion. I mean, it's something besides a penny, is it not?

A. It is not a penny, but it is also not par value. And it is not stated value.

THE COURT: What is it?

THE WITNESS: It is what's in the capital account on the books of the corporation.

THE COURT: How does that—How do you figure that? I don't mean—What's your accounting procedures? What's that reflective of in terms of accounting?

THE WITNESS: I'm not sure I can answer that question. I can answer what it is not. I'm not sure I can answer what it is.

THE COURT: Can you answer how they arrived at that figure?

THE WITNESS: Not in a way that I think would help the Court.

THE COURT: Okay.

[168] Q. Would you disagree that if I told you that the Department of Revenue considers this line to be the place to put par value of your outstanding shares?

A. I would not. But I would also say that we would put what's in our capital account there and not the par value. But I expect in the future we will change our procedures.

Q. But you're stating that you're basing the par value on a provision of Georgia law that provides that in certain circumstances the par value will be a penny regardless of the actual market value of your stock?

A. Because Georgia is a no-par state, it contains a provision that says when a par is needed for tax purposes the deemed par value is one penny per share.

Q. All right. Is that the basis of your former statements regarding the other companies and the fact that they have one cent par value stock and one share of stock issued that's based on the Georgia law; is that not right?

A. That's correct.

* * * *

[174] RECROSS-EXAMINATION
OF ADELE HOWELL SHEPHERD

Q. Your testimony about the "as if" domestics was predicated on the fact that these domestics would be subject to this Georgia law provision that provides for the one penny par value; is that not correct?

A. They are Georgia domestic corporations currently, and the calculation there was "as if" domestic using their current capital structure in the Georgia law.

* * * *

[195] CROSS-EXAMINATION
OF JAMES D. HANFORD

* * * *

[197] Q. Did you not calculate or try to determine whether or not this study was accurate?

A. Yes.

Q. Do you have any reason to believe it is not accurate?

A. Well, I wasn't able to verify the domestic franchise tax liability that's displayed in the study.

Q. Do you not have in your possession foreign corporation franchise tax returns filed by CSX?

A. Yes.

Q. Did you not hear Mr. Broadhead state earlier that that is the information that was pulled from that in order to perform this study?

A. Yes.

Q. All right. Then you did have the information you needed to calculate or verify the accuracy of this study, did you not?

A. Well—

Q. You had all the information Mr. Broadhead had, did you not?

A. I believe so.

Q. All right. Then do you have any reason to believe or do you find or do you conclude that that study is inaccurate?

A. What I heard yesterday was that in order for CSX Transportation to have a domestic corporation franchise tax liability, they would have to be incorporated in the state [198] of Alabama.

Q. That's correct.

A. We are not incorporated in the state of Alabama.

Q. I understand that. Did not someone ask you to check that study and see if you could find whether or not there were any inaccuracies in it with regard to your company?

A. Yes, sir.

Q. All right. Did you find any inaccuracies with regard to your company?

A. I was able to verify that the foreign franchise tax liability as paid was an accurate amount for each of the years and in total.

Q. Did you find any inaccuracies in the study?

A. Well, I was unable to verify the domestic corporation franchise tax liability.

Q. You don't know how to compute a domestic franchise tax liability?

A. No, sir. I do know how to compute it.

Q. Did you make an attempt to compute it based on the information in that foreign corporation franchise tax return?

A. Yes, I did.

Q. All right. And what was the result of that? Did you come up with figures that were different from what Mr. Broadhead came up with?

[199] A. No. If the assumption was made that CSX Transportation were a domestic corporation in Alabama and our existing capital structure remained the same,

then the line that is entitled domestic corporation "as if" franchise tax would have been accurate.

* * * *

[199] REDIRECT EXAMINATION
OF JAMES D. HANFORD

BY MR. BYARS:

Q. If CSXT were to incorporate in Alabama, would it incorporate under its present capital structure with regard to par value?

A. No, it would not. Part of my job is planning for franchise taxes and one of the planning ideas that I would definitely propose is that if we were to incorporate CSX Transportation in Alabama, we would incorporate them with penny par value stock in Alabama.

* * * *

[204] CROSS-EXAMINATION
OF ERNEST BROADHEAD

Q. Mr. Broadhead, I would like to return to State's Exhibit 1 for a minute if I may. Attached to this, which is the study done by the Department of Revenue under your direction, according to this return and according to this study, you took the total value of all shares of stock from the liability side of Schedule A. Where is that on this franchise tax return?

A. That's on the Schedule A on lines 14.

Q. That's for preferred stock and common stock?

A. And common stock. Now, in some cases in some instances [205] there may have been a separate balance sheet attached.

Q. Uh-huh.

A. In lieu of the taxpayer having completed this Schedule A on the return. And the par value of the stock was taken from the balance sheet in that case.

Q. Okay. With regard to the BellSouth Company and CSX Company, did you utilize that line on the return that they have filed to come up with a figure for their—the value of their stock?

A. We used the par value of the stock, the capital stock.

Q Okay. As it was listed on the return?

A. As it was listed on the return as reported by the taxpayer.

Q. What would be reported on Schedule E line 1, which is on page 3?

A. That would be outstanding capital stock at par value.

Q. And what is the difference between Schedule E line 1 and Schedule B—I mean Schedule A?

A. Line 14?

Q. Line 14.

A. That would be the capital stock less treasury stock that had been repurchased. It would not be outstanding. It would be issued but not outstanding.

Q. So you don't use treasury stock in computing the domestic franchise tax?

A. Yes, we use—in computing domestic franchise tax, we do [206] include treasury stock. It is not included in computing foreign franchise tax.

Q. Okay. So the foreign corporation return would not include it on Schedule A line 14 then?

A. Yes, Schedule A line 14 would include the issued capital stock at par value. But in computing the foreign franchise tax, you remove treasury stock from that figure. You do not remove the treasury stock in computing domestic franchise tax.

Q. All right.

A. So—

Q. Return to Schedule E line 2, what is that?

A. Schedule E? Surplus and undivided profits. That would consist of retained earnings, capital surplus of that amount that was paid for the stock in excess of par.

Q. All right. Why did you use Schedule A line 14 in computing the value of the stock in your study?

A. Because that was the issued capital stock at par value shown on line 14 which included treasury stock. There is no exclusion for treasury stock from the amount that's used to compute domestic franchise tax.

Q. And the par value of par stock on the book value of no-par stock is the second figure you would expect to find in Schedule A line 14?

A. Would you repeat that, please?

[207] Q. The par value of par stock or the book value of no-par stock is the figure you would expect to find on that line?

A. No.

Q. What would you expect to find?

A. It would be the par value of the stock or the stated value of the stock, not the book value.

* * * *

[209] RECROSS-EXAMINATION
OF ERNEST BROADHEAD

Q. Mr. Broadhead, I have a certified copy of the foreign corporation franchise tax return for BellSouth Telecommunications for 1992. On Schedule E line 1, would you read that figure, please?

A. $7,318—Excuse me, $7,318,959,147.00.

Q. All right. And that is—what is that line designated?

A. Outstanding capital stock.

Q. All right. And that figure of $7 billion, is that not correct?

A. That's correct.

Q. And what would you expect that figure to represent, you [210] being a franchise tax administrator with experience in this area?

A. That would represent the par value of their outstanding capital stock or the par value of their stock less treasury stock.

Q. All right. And if they were no-par, what would it be?

A. It would be zero or the stated value.

Q. If there is a stated value?

A. If there is a stated value, yes.

* * * *

[210] MR. BYARS: Your Honor, this is the testimony of Wayne White, CPA. And here's Your Honor's copy.

* * * *

[213] Q. In the practice of your profession, have you had an opportunity to represent and advise corporations concerning Alabama franchise tax liability? If so, what observations do you have?

A. Yes. In the practice of my profession, I have had the opportunity to represent and advise many corporations concerning Alabama franchise tax liability, both prior to incorporation and after incorporation.

Based on my observations, and in some cases, my advice, most newly incorporated Alabama domestic corporations that I have worked with have utilized a minimal arbitrary "par value" to minimize domestic franchise tax liability. In fact, the first time I heard of using "penny stock" for domestic Alabama franchise tax minimization was in a telephone conversation with a representative of the Alabama Department of Revenue.

Likewise, existing corporations have been advised by me to change and many have changed the par value of their capital stock to minimize domestic franchise tax liability.

Foreign corporations have been advised to and have incorporated under Alabama law to a wholly owned domestic [214] subsidiary with a minimal par value to minimize the total franchise tax liability.

Utilizing this strategy, the domestic subsidiary may have limited its domestic franchise tax burden to the mini-

mum amount (or a substantially decreased amount), while the parent foreign corporation is provided an exclusion from its tax base of the actual amount of its investment in the capital of other corporations organized under the Alabama laws. Thus, the Alabama franchise tax scheme provides tax incentives, which often result in discrimination in favor of those corporations incorporating under Alabama laws as compared to similar foreign corporations doing business in Alabama, solely on the basis of the state of incorporation.

* * * *

[267] RECROSS-EXAMINATION
OF LARRY RICHARDS

* * * *

Q. Did you ever take a look at any foreign corporations with a view to computing what they would have paid as domestic corporations?

A. My recollection is that some very preliminary thought was given to working it both ways. As I recall, the data necessary to make this computation; i.e., the par value of the capital stock, was not readily available for the foreign corporations. And it would have been extremely difficult to carry on that operation. So that avenue was abandoned [268] realizing that that was not a necessary thing to do, given that we could treat the domestic corporations "as if" foreign.

Q. Did you do any preliminary studies along those lines of computing the foreign corporations "as if" domestic?

A. I did not.

* * * *

[294] CROSS-EXAMINATION
OF ERNEST BROADHEAD

Q. Mr. Broadhead, with regard to all of the studies that were done under your direction relating to franchise

taxes, when [295] you calculated on the basis of the foreign franchise tax, is it a fact that you used the property factor as the sole factor in making that presentation?

A. Yes.

* * * *

January 14, 1997

THE COURT OF CIVIL APPEALS
OF ALABAMA

RE: 2960353

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*

v.

STATE OF ALABAMA, STATE DEPARTMENT OF REVENUE
(Appeal from Montgomery County Circuit Court:
CV 89-2600, CV 90-1591, CV 90-1711, CV 91-397,
CV 91-1079, CV 90-2555-2558, CV 91-2151)

You are hereby notified that the following action was taken in the above cause by the Court of Civil Appeals:

Appellants' motion to transfer joint appeal to the Supreme Court of Alabama is granted.

/s/ John H. Wilkerson, Jr.
JOHN H. WILKERSON, JR.
Clerk
Court of Civil Appeals

[Pl. Trial Exh. 1]

A Study of the Differences in the Franchise Tax Liability for Foreign vs. Domestic Corporations

Alabama
1988-1991

by

Larry E. Richards Ph.D.

The objective of this study was to determine whether the Alabama Franchise Tax scheme was discriminatory between domestic and foreign corporations prior to 1992. Although primary emphasis of this study is on the time period 1988 through 1991, conclusions may be applicable to the earlier period (1981 through 1987). The fact that Alabama by statute, facially or as applied, has different franchise tax bases and rates for domestic [1] vs. foreign corporations [2] creates differential treatment and the potential for discriminatory treatment of the two classes of corporations based solely on their state of incorporation. Domestic franchise tax is calculated on the tax base (par-value of capital stock) that at the time of incorporation is not necessarily related to corporate value, and that after the commencement of operations is not related to corporate value, while the foreign franchise tax is calculated upon a tax base (capital actually employed in Alabama) which is directly related to corporate value. These differences imposed by statute necessarily result in differential treatment which facially or as applied may result in discrimination between domestic and foreign corporations.

This underlying research was commenced by taking a statistically valid stratified random sample of Alabama domestic corporations. Domestic corporations were randomly selected from each of 7 strata which were based upon the ratio of corporate net worth to par-value. The sampled corporations were then treated as if they were foreign corporations and subjected to the franchise tax calculation under section 40-14-41.

The conclusion of this study is that the Alabama Franchise Tax statutes as applied have in fact resulted in

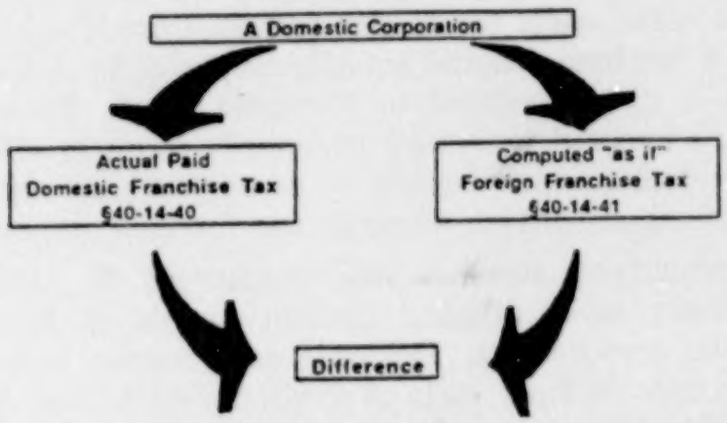
---

[1] Ala. Code 1975, § 40-14-40 ("Based on its capital stock" at the rate of $10 on each $1,000 of capital stock.) As applied by the Alabama Department of Revenue, the "capital stock" has been determined to mean "par-value of the capital stock," and applied as the tax base for domestic corporations.

[2] Ala. Code 1975, § 40-14-41 ("$3.00 on each $1,000.00 of the actual amount of its capital employed in this state.")

discrimination in favor of domestic corporations. Discrimination was determined by comparing the domestic franchise tax paid by the sampled corporations under section 40-14-40 with the foreign franchise tax liability calculated under 40-14-41 by treating the sample domestic corporations as if they were foreign corporations. The "as if foreign" franchise tax was computed for each sampled domestic corporation and the difference was determined between what each actually paid as a domestic corporation and what each would have paid had it been a foreign corporation. Figure 1 gives a graphic overview of the procedure employed in this investigation.

Figure 1



Conservatively calculated, the level of discrimination in favor of the more than 40,000 Alabama domestic corporations by years is as follows:

Year	Discrimination per Corporation	Average Domestic Franchise Tax	Average "As if Foreign" Franchise Tax	Percentage Discrimination	Discrimination Total
1988	$950.63	$231.22	$1181.85	411.14%	$39,027,183
1989	$972.14	$228.47	$1200.61	425.50%	$41,805,054
1990	$969.92	$225.05	$1194.97	430.98%	$42,996,440
1991	$1046.09	$205.46	$1251.55	509.15%	$46,333,602

For example, in 1988, the sample evidence demonstrates that the average increase in franchise tax per domestic corporation had the domestic corporation been subject to the same franchise tax base and rate as the foreign corporations (§ 40-14-41) would have been $950.63. And, the discrimination as a percent of the paid domestic franchise tax would be 411.14 percent. This population of Alabama domestic corporations paid $39,027,183 less in Alabama franchise tax than they would have had they been treated as foreign corporations.

Introduction

Discrimination would exist if the application of the franchise tax statute for domestic corporations consistently leads to franchise tax liability at a different (lower) level (magnitude) than the franchise tax liability produced by the application of the franchise tax statute for foreign corporations. If so, those domestic corporations taxed under section 40-14-40 that are paying franchise tax at a lower tax level than foreign corporations taxed under section 40-14-41 would be given discriminatorily preferential treatment. By applying the two different franchise tax bases and rates to each of the sampled domestic corporations, where the size and structure of each corporation remains constant, with one franchise tax calculation made pursuant to the domestic statute and the other calculation made pursuant to the foreign statute, the clear view of the true differences between the tax as imposed under the domestic statute as compared to tax imposed under the foreign statute becomes obvious. This is the approach taken in this research. Since the two groups (domestic vs. foreign) may have different financial structures and sizes, merely examining the average franchise tax for domestic vs. foreign corporations might not necessarily allow the detection of discrimination. However, when the same corporations are involved and it is the

difference in franchise tax that is measured, the size and structure are identical, the distinction made in White v. Reynolds, 558 So.2d 373, 384-86, 388-89 (Ala. 1989) is thereby removed.

A sample of domestic corporations was drawn in order to estimate the true mean difference in franchise tax. The results were used to test the hypotheses about the true mean differences (1988-1991). If the franchise tax statutes as applied do not lead to discrimination, the true mean differences ("as if foreign" tax minus domestic tax) would be zero; in other words, if there is no discrimination, the average difference would be zero.[3] If the average corporate franchise tax calculated by applying the foreign franchise tax base and rate is different from (higher than) the average corporate franchise tax calculated by applying the domestic franchise base and rate, there is discrimination in favor of domestic corporations. Therefore, if the statistical results lead to the rejection of the hypothesis that the true mean difference is zero, discrimination is statistically proven.

Data

A valid statistical sample of domestic corporations was drawn and the franchise tax difference was computed for each corporation "as if it were a foreign corporation." This resulted in a set of paired observations for each sample corporation; for each sample corporation the paired observations consisted of its known domestic franchise tax and its computed "as if foreign" franchise tax. The difference between the two values ("as if foreign" tax minus domestic tax) would indicate the increase (or decrease) in the franchise tax for the corresponding corporation if it paid franchise tax according to the foreign statute.

[3] This is not to say that each and every one of the corporate differences would be zero if there were no discrimination.

The source data used in the computations were from the computer tapes produced by the Alabama Department of Revenue as discovery responses and identified as FRAN FOR RV.FT.FF.ALL.YRS; RV.FT.FD.ALL.YRS FRAN DOM; RV.FT.SHARES.ALL YRS SHARES; RV.FT. SHARE.TAX.ASSMT; and RV.FT.FRAN.LEDGER, and certain information obtained from the Alabama domestic franchise tax returns, domestic shares tax returns and state income tax returns for the sample corporations.

Prior to the actual sample selection of domestic corporations, the population of domestic corporations was stratified on the basis of the ratio of net worth to par-value. Since the domestic franchise tax is calculated on a tax base of par-value of capital stock while the foreign franchise tax is calculated on a net worth tax base, corporations with similar ratios of net worth to par-value would in most instances have similar dollar differences ("as if foreign" tax minus domestic tax). To the extent that elements in a population can be grouped into non-overlapping sub-units (strata) with similar (homogenous) values, stratification yields efficient statistical estimates. Frequency distributions of the ratios of net worth to par-value for each of the years are shown in Tables 1(a-d).

Table 1a

Alabama
1988

Distribution of Ratios of Net Worth to Par-Value

Ratio	Number of Firms	Category Percentage
0	16226	39.5
.01 - .50	941	2.3
.51 - .99	715	1.7
1	3476	8.5
1.01 - 1.20	756	1.8
1.21 - 1.80	861	2.1
1.81 - 2.60	757	1.8
2.61 - 3.80	846	2.1
3.81 - 5.30	857	2.1
5.31 - 7.00	845	2.1
7.01 - 8.80	775	1.9
8.81 - 10.80	856	2.1
10.81 - 13.40	815	2.0
13.41 - 16.50	819	2.0
16.51 - 20.00	778	1.9
20.01 - 24.00	846	2.1
24.01 - 29.00	765	1.9
29.01 - 36.00	884	2.2
36.01 - 44.00	802	2.0
44.01 - 55.00	864	2.1
55.01 - 67.00	792	1.9
67.01 - 85.00	840	2.0
85.01 - 100.00	608	1.5
100.01 - 130.00	845	2.1
130.01 - 158.00	594	1.4
158.01 - 200.00	584	1.4
200.01 - 280.00	650	1.6
280.01 - 450.00	616	1.5
450.01 - 1150.00	620	1.5
> 1150.00	420	1.0
	41053	100

Ratio=TOTSHARES/((FD-PARCOM * FD-TOTALCOM)+(FD-PARPFRD * FD-TOTALPFRD))

Table 1b

Alabama
1989

Distribution of Ratios of Net Worth to Par-Value

Ratio	Number of Firms	Category Percentage
0	17415	40.5
.01 - .50	945	2.2
.51 - .99	692	1.6
1	3515	8.2
1.01 - 1.20	873	2.0
1.21 - 1.80	777	1.8
1.81 - 2.60	653	1.5
2.61 - 3.80	846	2.0
3.81 - 5.30	933	2.2
5.31 - 7.00	839	2.0
7.01 - 8.80	723	1.7
8.81 - 10.80	840	2.0
10.81 - 13.40	858	2.0
13.41 - 16.50	836	1.9
16.51 - 20.00	791	1.8
20.01 - 24.00	791	1.8
24.01 - 29.00	772	1.8
29.01 - 36.00	905	2.1
36.01 - 44.00	877	2.0
44.01 - 55.00	939	2.2
55.01 - 67.00	825	1.9
67.01 - 85.00	886	2.1
85.01 - 100.00	641	1.5
100.01 - 130.00	904	2.1
130.01 - 158.00	625	1.5
158.01 - 200.00	641	1.5
200.01 - 280.00	723	1.7
280.01 - 450.00	740	1.7
450.01 - 1150.00	706	1.6
> 1150.00	491	1.1
	43002	100

Ratio=TOTSHARES/((FD-PARCOM * FD-TOTALCOM)+(FD-PARPFRD * FD-TOTALPFRD))

Table 1c

Alabama
1990

Distribution of Ratios of Net Worth to Par-Value

Ratio	Number of Firms	Category Percentage
0	18246	41.2
.01 - .50	938	2.1
.51 - .99	653	1.5
1	3632	8.2
1.01 - 1.20	749	1.7
1.21 - 1.80	901	2.0
1.81 - 2.60	718	1.6
2.61 - 3.80	798	1.8
3.81 - 5.30	908	2.0
5.31 - 7.00	818	1.8
7.01 - 8.80	729	1.6
8.81 - 10.80	814	1.8
10.81 - 13.40	848	1.9
13.41 - 16.50	819	1.8
16.51 - 20.00	801	1.8
20.01 - 24.00	831	1.9
24.01 - 29.00	798	1.8
29.01 - 36.00	914	2.1
36.01 - 44.00	907	2.0
44.01 - 55.00	968	2.2
55.01 - 67.00	830	1.9
67.01 - 85.00	947	2.1
85.01 - 100.00	631	1.4
100.01 - 130.00	883	2.0
130.01 - 158.00	668	1.5
158.01 - 200.00	668	1.5
200.01 - 280.00	779	1.8
280.01 - 450.00	758	1.7
450.01 - 1150.00	809	1.8
> 1150.00	566	1.3
	44329	100

Ratio=TOTSHARES/((FD-PARCOM * FD-TOTALCOM) + (FD-PARPFRD * FD-TOTALPFRD))

Table 1d

Alabama
1991

Distribution of Ratios of Net Worth to Par-Value

Ratio	Number of Firms	Category Percentage
0	18556	41.9
.01 - .50	888	2.0
.51 - .99	656	1.5
1	3067	6.9
1.01 - 1.20	717	1.6
1.21 - 1.80	890	2.0
1.81 - 2.60	657	1.5
2.61 - 3.80	829	1.9
3.81 - 5.30	879	2.0
5.31 - 7.00	820	1.9
7.01 - 8.80	743	1.7
8.81 - 10.80	810	1.8
10.81 - 13.40	794	1.8
13.41 - 16.50	849	1.9
16.51 - 20.00	808	1.8
20.01 - 24.00	785	1.8
24.01 - 29.00	824	1.9
29.01 - 36.00	983	2.2
36.01 - 44.00	875	2.0
44.01 - 55.00	952	2.1
55.01 - 67.00	846	1.9
67.01 - 85.00	967	2.2
85.01 - 100.00	653	1.5
100.01 - 130.00	975	2.2
130.01 - 158.00	621	1.4
158.01 - 200.00	690	1.6
200.01 - 280.00	851	1.9
280.01 - 450.00	788	1.8
450.01 - 1150.00	863	1.9
> 1150.00	655	1.5
	44291	100

Ratio=TOTSHARES/((FD-PARCOM * FD-TOTALCOM) + (FD-PARPFRD * FD-TOTALPFRD))

Given the similarity of the four distributions, the following stratification was chosen;

Strata	*Ratio*
1	0
2	0.01-2.60
3	2.61-55.00
4	55.01-130.00
5	130.01-450.00
6	450.00 and over
7	Alabama Power Company [4]

Random samples of domestic corporations were drawn form each of the first six strata for each of the four years (1988-1991). The 7th stratum contains only Alabama Power Company and it was selected for each of those four years. The sample corporations were identified and copies of their Alabama tax returns were obtained from the Alabama Department of Revenue. From the data obtained from these sources, the "as if foreign" franchise tax liability for each of the sampled corporations was calculated based on actual financial data of each sampled corporation including an allocation for the estimated capital employed in Alabama. In cases where complete information to calculate the tax liability was not available, conservative assumptions were made in such a manner to reduce the "as if foreign" tax. This procedure resulted in a smaller estimate of the mean difference, as the resulting "as if foreign" franchise tax calculations are lower than they would have been if complete data were available.

---

[4] A 7th stratum was established containing only Alabama Power, an Alabama domestic corporation, which is much larger than any of the other domestic corporations. If Alabama Power were left in stratum 6 where it would fall, that stratum would most likely have a large variance which in turn would result in a less efficient estimate. By establishing a separate stratum for Alabama Power, the potentially large or inflated variance can be and is eliminated.

Estimation

The objective of this phase of the research was to statistically estimate the true mean difference per domestic corporation between the franchise tax it actually paid as a domestic corporation and the franchise tax it would have paid if it had been a foreign corporation. As the sampling was stratified random sampling, the appropriate form of the estimator is as shown below.

$$\bar{y}_{st} = \frac{1}{N}[N_1\bar{y}_1 + N_2\bar{y}_2 + \cdots + N_L\bar{y}_L] = \frac{1}{N}\sum_{i=1}^{L} N_i\bar{y}_i$$

where $\bar{y}_{st}$ is the stratified estimator of the population mean difference

$\bar{y}_i$ is the sample mean difference in the ith stratum

N_i is the number of corporations in the ith stratum

N is the total number of corporations in the population

The resulting valid statistical estimates are given in Tables 2(a-d). At the bottom of each table there are two values given. The first is the stratified estimate of the average dollar difference in franchise tax per domestic corporation. The second value is an estimate of the total increase in franchise tax revenue that would have resulted had the domestic corporations actually paid Alabama franchise tax according to the tax statute for foreign corporations, section 40-14-41. The backup materials (data and summary statistics) for Tables 2(a-d) are given in Appendix A.

In order to test the hypotheses that the Alabama franchise tax statutes, facially or as applied, are not discriminatory, it was necessary to estimate the variances of the sampling distributions of the individual estimates. The appropriate estimates of variances result from using the following equation:

$$\hat{V}(\bar{y}_{st}) = \frac{1}{N^2}[N_1^2\hat{V}(\bar{y}_1) + N_2^2\hat{V}(\bar{y}_2) + \cdots + N_L^2\hat{V}(\bar{y}_L)]$$

$$= \frac{1}{N^2}\left[N_1^2\left(\frac{N_1 - n_1}{N_1}\right)\left(\frac{s_1^2}{n_1}\right) + \cdots + N_L^2\left(\frac{N_L - n_L}{N_L}\right)\left(\frac{s_L^2}{n_L}\right)\right]$$

where s_i^2 is the sample variance for the ith stratum

n_i is the sample size from the ith stratum

Table 2a

Alabama Domestic Corporations Treated as if Foreign

Year 1988

Stratum	Sample Size	Stratum Size	Sample Mean	Ni*Sample Mean
0	36	16226	250.65	4067046.90
0.01-2.60	65	7506	78.11	586256.13
2.61-55.00	48	10752	414.12	4452596.74
55.01-130.00	48	3085	1423.87	4392635.87
130.01-450.00	38	2444	3082.50	7533617.78
450.01+	33	1040	7043.81	7325566.56
Alabama Power	1	1	10669463.30	10669463.30
		41054		39027183.27

Stratified Estimate of the Dollar Difference in Franchise Tax per Corporation **$950.63**

Stratified Estimate of the Dollar Difference in Franchise Tax Total **$39,027,183**

Table 2b

Alabama Domestic Corporations Treated as if Foreign

Year 1989

Stratum	Sample Size	Stratum Size	Sample Mean	Ni*Sample Mean
0	48	17415	151.82	2643893.06
0.01-2.60	48	7455	162.98	1214986.08
2.61-55.00	34	10950	473.33	5182985.40
55.01-130.00	40	3256	469.53	1528799.45
130.01-450.00	31	2729	1370.99	3741426.25
450.01+	35	1197	13460.21	16111872.57
Alabama Power	1	1	11381091.23	11381091.23
		43003		41805054.03

Stratified Estimate of the Dollar Difference in Franchise Tax per Corporation **$972.14**

Stratified Estimate of the Dollar Difference in Franchise Tax Total **$41,805,054**

Table 2c

Alabama Domestic Corporations Treated as if Foreign

Year 1990

Stratum	Sample Size	Stratum Size	Sample Mean	Ni*Sample Mean
0	49	18246	55.12	1005664.78
0.01-2.60	79	7591	53.39	405306.26
2.61-55.00	30	10953	471.26	5161656.02
55.01-130.00	45	3291	744.55	2450327.21
130.01-450.00	40	2873	1671.65	4802644.70
450.01+	40	1375	12043.69	16560073.75
Alabama Power	1	1	12610767.46	12610767.46
		44330		42996440.19

Stratified Estimate of the Dollar Difference in Franchise Tax per Corporation **$969.92**

Stratified Estimate of the Dollar Difference in Franchise Tax Total **$42,996,440**

Table 2d

Alabama Domestic Corporations Treated as if Foreign

Year 1991

Stratum	Sample Size	Stratum Size	Sample Mean	Ni*Sample Mean
0	58	18556	362.42	6725065.52
0.01-2.60	75	6875	43.34	297948.75
2.61-55.00	41	10951	550.31	6026422.908
55.01-130.00	46	3441	1121.71	3859786.905
130.01-450.00	30	2950	1431.41	4222671.3
450.01+	40	1518	8709.94	13221694.99
Alabama Power	1	1	11980011.20	11980011.2
		44292		46333601.58

Stratified Estimate of the Dollar Difference in Franchise Tax per Corporation $1,046.09

Stratified Estimate of the Dollar Difference in Franchise Tax Total $46,333,602

The computations of the various estimated variances are given in Appendix B.

Statistical Tests of Discrimination

Given the sample sizes and that the sampling was stratified random, the sampling distributions of the various annual estimates of the true mean differences would be approximately normally distributed. Therefore, the estimated mean difference divided by the positive square root of the estimated variance of its sampling distribution (estimated standard error) would approximately follow a standard normal probability density function *if the true means of the populations of differences were zero.* By dividing the estimate of the true mean difference for each year by its estimated standard error and comparing the resulting value to the standard normal distribution, the

hypothesis that the true mean difference is zero can be tested. Table 3 shows the results of the procedure.

Table 3

Year	Estimated Mean Difference	Estimated Standard Error	Computed Z	One-Tail P value
1988	950.63	194.21	4.89	0.000000
1989	972.14	206.50	4.71	0.000001
1990	969.92	173.98	5.57	0.000000
1991	1046.09	133.35	7.84	0.000000

The computed Z values and their associated one-tail P values indicate that the sample results strongly refute the hypotheses that the true mean differences are zero and lead to the rejection of these hypotheses. The P value is the probability of observing a sample results as extreme as that observed (that indicates discrimination in favor of the domestic corporation as strongly as the sample does) if the hypothesis (true mean difference equal zero and thus, no discrimination in favor for the domestic corporations) is in fact true. The P values near zero (only 1989 is not zero rounded to six decimal places) indicate that it would be next to impossible (less than one chance in a million) to draw a stratified random sample (as we did) and obtain sample results as extreme as those that resulted if in fact the true population mean differences were zero. These statistical tests clearly lead to the rejection of the hypotheses that discrimination does not exist.

An alternative way to describe the statistical results would be to give confidence interval estimates for the true mean difference for each year. This is accomplished by adding and subtracting 1.96 times the estimated standard error to the estimated mean difference to arrive at the resulting 95% confidence interval. Table 4 shows the results for this procedure.

Table 4

Year	Estimated Mean Difference	Estimated Standard Error	Lower Limit	Upper Limit
1988	950.63	194.21	569.98	1331.28
1989	972.14	206.50	567.40	1376.88
1990	969.92	173.98	628.92	1310.92
1991	1046.09	133.35	784.72	1307.46

A confidence interval is designed to capture or contain the true population value, in this case the true mean difference between the "as if foreign" franchise tax and the actual domestic franchise tax per domestic corporation. The only acceptable (statistically founded) estimate is or would be the point estimate on which the interval is based. In our case this point estimate is called "Estimated Mean Difference". The fact that none of the 95 percent intervals contains zero also allows the statistical conclusion that the true mean differences are not zero.

Estimation of Tax Rates

Given the sample data used to investigate the existence of discrimination between the Alabama franchise tax statutes, it was also possible to estimate the effective tax rates for domestic corporations based on their capital employed in Alabama. By statute § 40-14-41 foreign corporations pay Alabama franchise tax at the rate of $3 per thousand dollars of capital employed in Alabama. Therefore, the appropriate comparison would be to the tax rate (domestic franchise tax divided by the capital employed in Alabama (000) dollars) for domestic corporations.

Table 5 gives three different tax rates. Column (C) shows the statutory $3 or 3.00 tax rate for foreign corporations. Column (E) represents the ratio of domestic franchise tax to capital employed in Alabama for domestic corporations and is therefore, the estimated domestic franchise tax rate. We can see that the estimates of the effective domestic franchise tax rates are less than $0.60.

This means that the domestic corporations paid the annual franchise tax at a rate of less than $0.60 per thousand dollars of capital employed in Alabama. Or, said another way, the foreign corporations paid franchise tax to Alabama at five times ($3.00/$0.60 = 5) the rate of the domestic corporations.

It is my understanding that Alabama Department of Revenue contends that the Alabama shares tax is a complementary tax to the franchise tax for domestic corporations. By statute, the shares tax is not a tax liability of the domestic corporation but is imposed on the shareholders of the corporation. In the event that a decision is made that the shares tax is complementary and therefore should be included in the analysis of discrimination, I have shown the results of the inclusion. Figure 2 provides a graphic view of this procedure and Table 5 shows the average shares tax for domestic corporations in column (F). These values are based on the statewide composite millage rates provided by the Alabama Department of Revenue. Column (G) is the sum of columns (D) and (F) and is therefore the total tax (franchise tax plus shares tax). Column (H) is then the total tax divided by the capital employed in Alabama and is the estimated domestic total tax rate. We can see that these rates are approximately 1.5 (or $1.50) which indicates that even if one includes the shares tax, the domestic corporations have an effective tax rate that is only half that of the foreign corporations ($1.50 domestic vs. $3.00 foreign).

Table 5a is identical to Table 5 with the exception that the maximum millage rate per county was used to estimate shares tax. Clearly the domestic total tax rates in column (H) in Table 5a would overstate the actual tax rates as not all corporations within a given county are located in that area with the maximum millage rate.

Table 5
Estimated Tax Rates per $1000 of Capital Employed in Alabama

Year	(A) Capital Employed in Alabama (000)	(B) Average "As if Foreign" Franchise Tax	(C) Foreign Franchise Tax Rate	(D) Domestic Franchise Tax	(E) Domestic Franchise Tax Rate	(F) Shares Tax (composite)	(G) Average Total Tax per Dom. Corp.	(H) Domestic Total Tax Rate
1988	$393.95	$1,181.85	3.00	$231.22	0.587	$333.16	$564.38	1.433
1989	$400.20	$1,200.61	3.00	$228.47	0.571	$404.39	$632.86	1.581
1990	$398.32	$1,194.97	3.00	$225.05	0.565	$375.13	$600.18	1.507
1991	$417.18	$1,251.55	3.00	$205.48	0.492	$403.02	$608.48	1.459

Formulas and Definitions for Columns

(A) is the estimated average capital employed in Alabama per domestic corporation.
(B) is the estimated average "as if foreign" franchise tax per corporation.
(C) is the statutory or actual foreign franchise tax rate.
(D) is the estimated average domestic franchise tax per corporation.
(E) equals (D)/(A) and is the estimated domestic franchise tax rate.
(F) is the average shares tax per corporation using the statewide composite millage rate.
(G) equal (D)+(F) and is the estimated average total tax per domestic corporation.
(H) equals (G)/(A) and is the estimated total tax rate per domestic corporation.

Table 5a
Estimated Tax Rates per $1000 of Capital Employed in Alabama

Year	(A) Capital Employed in Alabama (000)	(B) Average "As if Foreign" Franchise Tax	(C) Foreign Franchise Tax Rate	(D) Domestic Franchise Tax	(E) Domestic Franchise Tax Rate	(F) Shares Tax (county max)	(G) Average Total Tax per Dom. Corp.	(H) Domestic Total Tax Rate
1988	$393.95	$1,181.85	3.00	$231.22	0.587	$413.24	$644.46	1.636
1989	$400.20	$1,200.61	3.00	$228.47	0.571	$490.32	$718.79	1.796
1990	$398.32	$1,194.97	3.00	$225.05	0.565	$462.41	$687.46	1.726
1991	$417.18	$1,251.55	3.00	$205.48	0.492	$479.05	$684.51	1.641

Formulas and Definitions for Columns

All columns in Table 5a are the same as in Table 5 except for column (F).
(F) is the average shares tax per corporation using the county maximum millage rate.

Figure 2

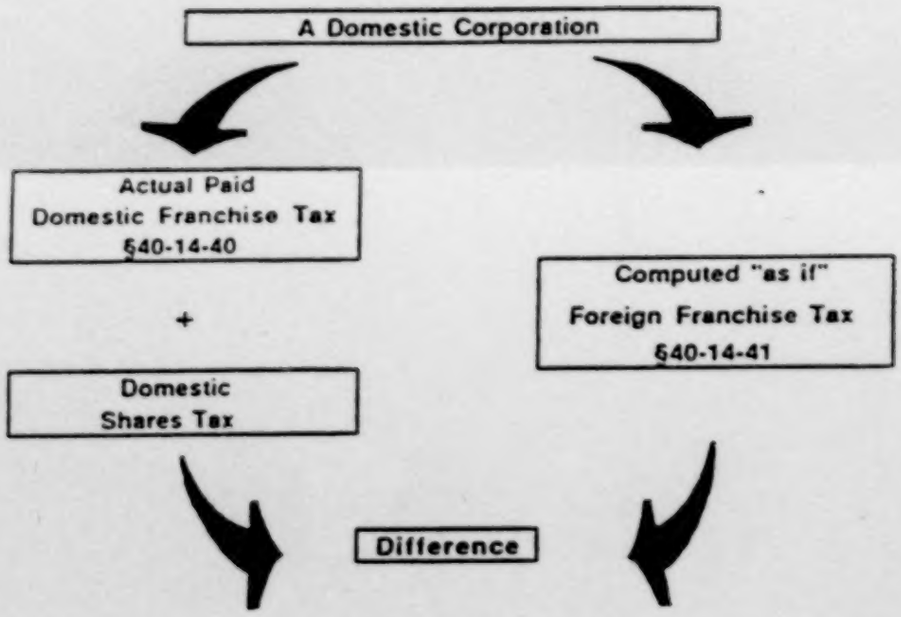
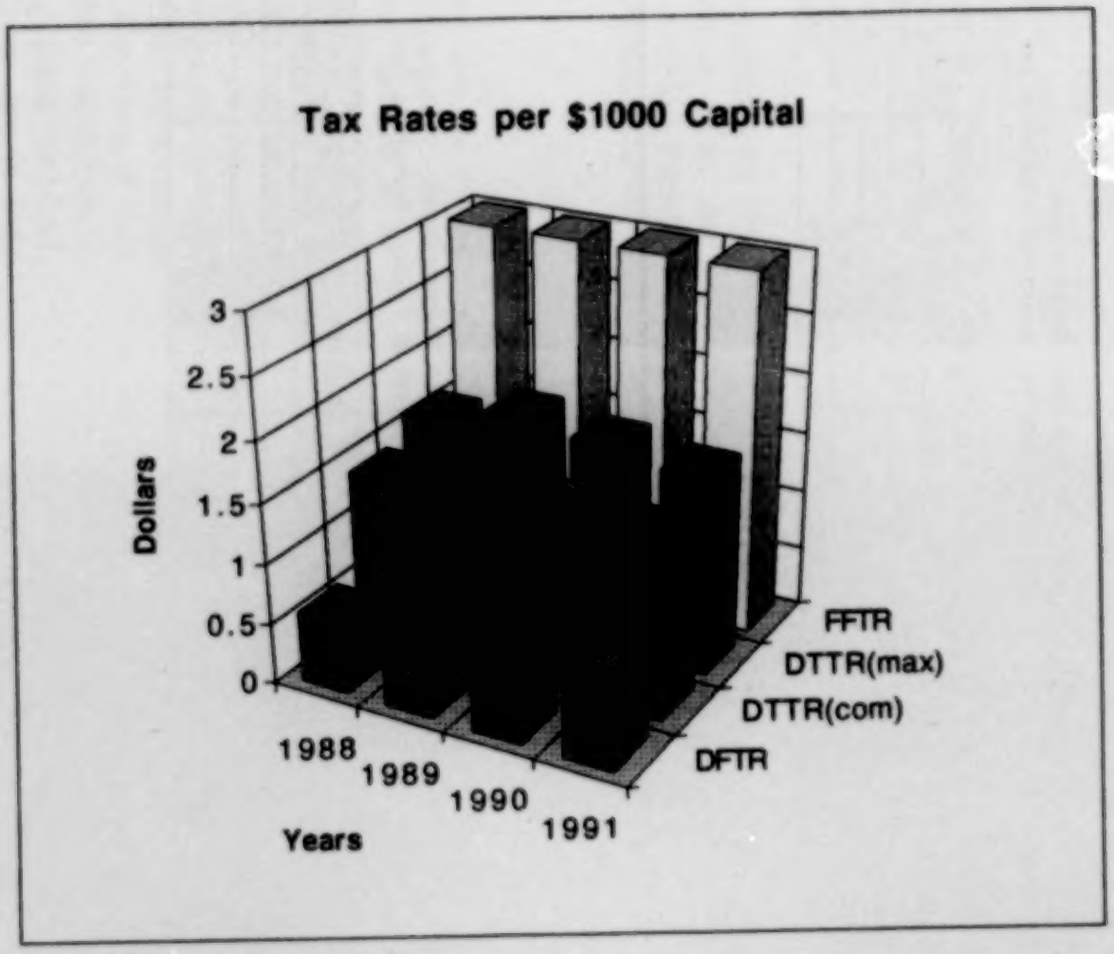

A Domestic Corporation
Actual Paid
Domestic Franchise Tax
§40-14-40
+
Domestic
Shares Tax
Computed "as if"
Foreign Franchise Tax
§40-14-41
Difference

Figure 3



DFTR is the domestic franchise tax rate.
DTTR(com) is the domestic total (franchise plus shares) tax rate.
DTTR(max) is DTTR using county maximum millage rate.
FFTR is the foreign franchise tax rate.

Table 6

Discrimination in favor of Domestic Corporations
Comparing Total Domestic Tax (Franchise plus Shares) to Foreign Franchise Tax

Year	Discrimination per Corporation	Average Domestic Franchise Tax	Shares Tax (composite)	Average Total Tax per Dom. Corp.	Average "As if Foreign" Franchise Tax	Percent Discrimination	Discrimination Total
1988	$617.47	$231.22	$333.16	$564.38	$1,181.85	109%	$25,349,613
1989	$567.75	$228.47	$404.39	$632.86	$1,200.61	90%	$24,414,953
1990	$594.79	$225.05	$375.13	$600.18	$1,194.97	99%	$26,367,041
1991	$643.07	$205.46	$403.02	$608.48	$1,251.55	106%	$28,482,856

Table 6a

Discrimination in favor of Domestic Corporations
Comparing Total Domestic Tax (Franchise plus Shares) to Foreign Franchise Tax

Year	Discrimination per Corporation	Average Domestic Franchise Tax	Shares Tax (county max)	Average Total Tax per Dom. Corp.	Average "As if Foreign" Franchise Tax	Percent Discrimination	Discrimination Total
1988	$537.39	$231.22	$413.24	$644.46	$1,181.85	83%	$22,062,009
1989	$481.82	$228.47	$490.32	$718.79	$1,200.61	67%	$20,719,705
1990	$507.51	$225.05	$462.41	$687.46	$1,194.97	74%	$22,497,918
1991	$567.04	$205.46	$479.05	$684.51	$1,251.55	83%	$25,115,336

Figure 3 gives a graphic view of the four different tax rates. The discrimination in favor of the domestic corporations is clearly evident. Table 6 shows the discrimination between total domestic tax (domestic franchise tax plus domestic shares tax) and foreign franchise tax. The next to last column in Table 6 indicates that the discrimination is approximately 100%. This means that the "as if foreign" franchise tax for the domestic corporations would be twice (two times) their total domestic tax.

As with Table 5, Table 6a is identical to Table 6 with the exception that the maximum millage rate per county was used to estimate shares tax. Again, the "Average Total Tax per Dom. Corp." column in Table 6a would clearly overstate the actual tax level.

The statistical procedures that have been applied in this research (stratification, sampling, estimators, tests and interval estimates) have mathematical (provable) foundations and are in accordance with generally accepted valid statistical practice and procedures.

Conclusion

The mean difference ("as if foreign" franchise tax minus actual domestic franchise tax) for the population of domestic corporations in Alabama is positive (above zero) in each of the years 1988, 1989, 1990 and 1991. Therefore, discrimination does exist and the discrimination is in favor of the domestic corporations. The population of domestic corporations in Alabama for each of the years in 1988-1991 time period paid less franchise tax in Alabama than they would have paid as foreign corporations and they would have paid more in franchise taxes if they had been subject to the same franchise tax calculation or treatment as a foreign corporation under section 40-14-41. Even if it is ruled that the Alabama shares tax is complementary to the franchise tax and should therefore be included in the comparison between domestic and foreign corporations, substantial (foreign tax rate twice that for domestics) discrimination is established.

[Pl. Trial Exh. 3]

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

CV-90-2555-G

CSX TRANSPORTATION, INC., A Corporation

CV-90-2556-M

CSX TRANSPORTATION, INC., A Corporation

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE

CV-90-2557-PH

CSX TRANSPORTATION, INC., A Corporation

CV-90-2558-PR

CSX TRANSPORTATION, INC., A Corporation

v.

JAMES M. SIZEMORE, JR., As Commissioner of Revenue;
and STATE OF ALABAMA, DEPARTMENT OF REVENUE

CONSOLIDATED DISCOVERY—
INTERROGATORIES, REQUESTS FOR
PRODUCTION AND REQUESTS FOR
ADMISSIONS BY TAXPAYER

TAXPAYER'S FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION AND REQUESTS FOR ADMISSIONS TO COMMISSIONER AND DEPARTMENT

I.

DIRECTIONS FOR ANSWERING INTERROGATORIES AND PRODUCING MATERIALS AND THINGS

1. Interrogatories are to be answered under oath within the time required by law, unless the time is shortened by the Court.

2. There is a space provided between each interrogatory and it is requested that you place your answers in the space provided below each question if possible. If additional space is required, please note that additional space is required for your answer and attached the additional pages to your answers.

3. Materials to be produced for inspection and copying are to be produced at the offices of Steiner, Crum & Baker, 8th Floor, First Alabama Bank Building, 8 Commerce Street, Montgomery, Alabama 36014, within the time prescribed by law, unless the time is shortened by the Court. Alternatively, you may produce copies of the materials requested in the office of the general counsel or Chief of the Franchise Tax Division of the State of Alabama Department of Revenue or by sending the same to the offices of Steiner, Crum & Baker.

DEFINITIONS

The following are definitions of various words and phrases which are contained in the attached discovery requests for the purpose of clarifying the meaning of various words and phrases contained herein in order to assist the State of Alabama Department of Revenue and its Commissioner to understand the objectives of these

discovery efforts and to locate and furnish the relevant information and materials. An affirmative response on the part of Department or Commissioner will not be construed as an admission that any definition contained herein is either factually correct or legally binding on them

1. DEPARTMENT means State of Alabama Department of Revenue.

2. COMMISSIONER means James M. Sizemore, Jr., as Commissioner of Revenue of the State of Alabama.

3. CSXT or TAXPAYER means singly CSX Transportation, Inc. and collectively CSX Transportation, Inc. and its predecessor corporations, Seaboard Coast Line Railroad Company, Louisville & Nashville Railroad Company and Seaboard System Railroad, Inc.

4. ALA. CODE or CODE means Code of Alabama 1975, as amended.

5. CAPITAL means and refers to capital as defined in Ala. Code § 40-14-41(b).

6. DOMESTIC CORPORATION means and refers to a domestic corporation as more particularly defined in Ala. Code § 40-14-40.

7. FOREIGN CORPORATION means and refers to a foreign corporation as defined in Ala. Code § 40-14-41.

8. DOCUMENT means the original or any copy of any written, recorded, transcribed, printed or impressed matter of whatever kind, however produced or reproduced, including but not limited to sound pictorial recordings, word processing, electronic or computerized information, books, pamphlets, letters, memoranda, telegrams, electronic or mechanical transmissions, communications of all kinds, reports, operating statements, working papers, handwritings, charges, graphs, papers, writings, printings, transcriptions, copies, photographic reproduction, data compilations from which information can be obtained, tapes and records of all kinds.

III

Requests for Admissions

Pursuant to Rule 36 A.R.Civ.P., Taxpayers request Department and Commissioner to admit the truth of the following facts:

1. A. CSXT and each and all of the other predecessor companies are classified as foreign corporations for the purpose of paying Alabama franchise tax pursuant to Ala. Code § 40-14-41(a).

B. For the purposes of Alabama franchise tax, CSXT is and each of its predecessor companies is a foreign corporation by reason of its state of incorporation being other than Alabama.

2. A foreign corporation, for the purposes of Alabama franchise tax, is any corporation "organized under the laws of any state other than Alabama—organized under the laws of any other state, national or territory. . . ." Ala. Code § 40-14-41(a).

3. A domestic corporation, for the purposes of Alabama franchise tax, is any corporation organized under the laws of Alabama—"every corporation organized under the laws of this state. . . ." Ala. Code § 40-14-40.

4. A. All foreign corporations, including CSXT are required to file its franchise tax return and are required to pay Alabama franchise tax as a foreign corporation pursuant to Ala. Code § 40-14-41. Each foreign corporation doing business in Alabama pays franchise tax to the State of Alabama in an amount which is determined by applying the tax of $3.00 per $1,000 to the amount of capital employed in the State of Alabama by that corporation. Pursuant to statute, the amount of capital employed against which this tax rate is multiplied is the total actual value of the following items of capital employed by that foreign corporation in the State of Alabama, sub-

ject to the exclusions and deductions from the tax base as set forth in Ala. Code § 40-14-41(d) and subject to the maximum tax base for public utilities and transportation companies, such as South Central, in the value of the sum of its tangible property located in Alabama and its intangible property employed in the conduct of its business in Alabama:

(a) Outstanding capital stock;

(b) Surplus and undivided profits;

(c) Long term debt;

(d) Certain related party debts; and

(e) Accelerated depreciation.

B. The franchise tax imposed upon CSXT and other foreign corporations is based on the actual value of the capital employed in the State of Alabama, including the actual value of each of its components set forth in Ala. Code § 40-14-41:

(a) Outstanding capital stock;

(b) Surplus and undivided profits;

(c) Long term debt;

(d) Certain related party debts; and

(e) Accelerated depreciation.

Subject to the exclusions and deductions and maximum set forth in A.

5. A. The Alabama franchise tax is imposed upon foreign corporations pursuant to Ala. Code § 40-14-41 for the privilege of doing business within the State of Alabama.

B. The Alabama franchise tax is imposed upon domestic corporations pursuant to Ala. Code § 40-14-40

for the identical privilege of doing business within the State of Alabama.

6. Art. XII, § 232, Constitution of Alabama of 1901, provides for and authorizes the levy of a franchise tax on foreign corporations "based on the actual amount of capital employed in this state."

7. Art. XII, § 232, Constitution of Alabama of 1901, does not define "capital employed in this state" to include:

(a) Outstanding capital stock;

(b) Surplus and undivided profits;

(c) Long term debt;

(d) Certain related party debts; and

(e) Accelerated depreciation.

8. The Alabama franchise tax imposed upon domestic corporations pursuant to Ala. Code § 40-14-40 is computed by applying the tax rate of $10 per $1,000 to the amount of the par value of the capital stock of the corporation.

9. Art. XII, § 229, Constitution of Alabama of 1901, provides for and authorizes the levy of a franchise tax on domestic corporations "in proportion to the amount of capital stock."

10. The tax base for the Alabama domestic franchise tax does not include the actual value of its capital stock.

11. The Alabama franchise tax imposed pursuant to Ala. Code § 40-14-40 upon domestic corporations is not computed by applying the applicable tax rate multiplied by the actual value of the capital stock of the domestic corporation.

12. The tax base upon which Alabama franchise tax is imposed pursuant to Ala. Code § 40-14-40 upon domestic corporations does not include surplus and undi-

vided profits, long-term debt, the amount of certain related party debt, or the accelerate depreciation of the domestic corporation, which are not factors in determining the amount of franchise tax to be paid by a domestic corporation.

13. The tax base of foreign corporations for the purpose of determining the amount of Alabama franchise tax to be paid by foreign corporations pursuant to Ala. Code § 40-14-42, includes items of capital not included in the franchise tax base of domestic corporations for the purpose of determining the amount of Alabama franchise tax to be paid by domestic corporations pursuant to Ala. Code § 40-14-40.

14. Capital stock upon which tax base domestic corporations pay Alabama franchise tax for the privilege of doing business in Alabama is not defined in either Art. XII, § 229, AL. CONST. or Ala. Code § 40-14-40.

15. Capital stock upon which tax base domestic corporations pay Alabama franchise tax for the privilege of doing business in Alabama is not defined in either Art. XII, § 229, AL. CONST. or Ala. Code § 40-14-40, to authorize or require the levy of the domestic franchise tax base solely upon the par value of a domestic corporation's capital stock.

16. Department and Commissioner have for the purposes of determining the franchise tax levied on a domestic corporation pursuant to Ala. Code § 40-14-40 based the levy of such tax solely upon the par value of the capital stock of each domestic corporation.

17. Department and Commissioner for the purposes of determining the franchise tax on foreign corporations, including CSXT, pursuant to Ala. Code § 40-14-41 has based the levy on the full actual value of capital employed in the State of Alabama, including the outstanding capital stock, surplus and undivided profits, long-term

debt, certain related party debts and accelerated depreciation of each foreign corporation.

18. The par value of shares of capital stock of a domestic corporation is a fictitious value which does not represent the actual value of the capital stock of that domestic corporation.

19. Under the corporate laws of Alabama, a corporation organized under the laws of this state may by its own action increase or decrease the "par value" of its capital stock.

20. Under the corporate laws of Alabama, a corporation organized under the laws of this state may by its own action increase or decrease the "par value" of its capital stock, without any basis, measure or yardstick for determining "par value" or the amount of "par value."

21. A domestic corporation can reduce the amount of franchise tax paid by it pursuant to Ala. Code § 40-14-40 by reducing the par value of its capital stock.

22. A foreign corporation doing business in the State of Alabama cannot reduce the amount of Alabama franchise taxes paid by it pursuant to Ala. Code § 40-14-41 by reducing the par value of its capital stock.

23. A foreign corporation doing business in the State of Alabama cannot reduce the actual amount of its capital employed in Alabama by reducing the par value of its capital stock.

24. CSXT and other foreign corporations who engage in business within Alabama are required to pay taxes on the tax base set forth in Ala. Code § 40-14-41 solely by virtue of the fact that they are organized in a state other than the State of Alabama.

25. Department and Commissioner have levied Alabama franchise taxes on domestic corporations pursuant to Ala. Code § 40-14-40 based on a tax base of the

"par value" of the shares of capital stock of domestic corporations while levying the Alabama franchise tax on CSXT and other foreign corporations engaging in business within Alabama pursuant to Ala. Code § 40-14-41, based on the full actual value of capital employed in the State of Alabama by each of the foreign corporations which tax base include the full actual value of the outstanding stock, surplus and undivided profits, long-term debt, certain related party debts and accelerated depreciation subject to the exclusion and deductions set forth in § 40-14-41(d) and subject to the maximum tax base for public utilities and transportation companies, such as CSXT, in the value of the sum of its tangible property located in Alabama and its intangible property employed in the conduct of its business in Alabama.

26. There is no statutory basis for using "par value" of capital stock as a tax base for domestic corporations.

27. There is no basis in the Alabama Constitution for using "par value" of capital stock as a tax base for domestic corporations.

28. The Department and Commissioner use "par value" of capital stock as the sole tax base for domestic corporations.

IV

Request for Production

Pursuant to Rule 34, A.R.Civ.P., CSXT requests and move the production of the following documents and things:

1. For each of the franchise tax years 1982 through 1991—

(a) All documents and all studies and all accumulations or compilations of information or data including without limitation any computerized data or information which may be assembled in a computer printout showing

for each corporation filing a domestic franchise tax return or paying domestic franchise taxes for that year, the following:

(i) The identity of the corporation (name may be withheld if identified by symbol or numeral so that the corporation later may be identified);

(ii) The aggregate par value of its capital stock;

(iii) The aggregate book value of its capital stock;

(iv) The aggregate stockholders equity, including actual value of outstanding capital stock, surplus and undivided profits;

(v) The total actual value of capital employed in Alabama as defined in Ala. Code § 40-14-41 to be the tax base upon which foreign franchise taxes were calculated or paid;

(vi) The amount of domestic franchise tax paid or due to be paid on the return as filed, as finally amended or as assessed;

(vii) The amount of corporate shares tax paid by the domestic corporation.

(b) All documents and all studies and all accumulations or compilations of information or data including without limitation any computerized data or information which may be assembled in a computer printout showing for each corporation filing a foreign franchise tax return or paying foreign franchise taxes for that year:

(i) The identity of the corporation (name may be withheld if identified by symbol or numeral so that the corporation later may be identified);

(ii) The aggregate par value of its capital stock;

(iii) The aggregate book value of its capital stock;

(iv) The aggregate stockholders equity, including actual value of outstanding capital stock, surplus and undivided profits;

(v) The total actual value of capital employed in Alabama as defined in Ala. Code § 40-14-41 to be the tax base upon which foreign franchise taxes were calculated or paid;

(vi) The amount of foreign franchise tax paid or due to be paid on the return as filed, as finally amended or as assessed.

(c) All documents and all studies and all accumulations or compilations of information and data including without limitation any computerized date or information which may be assembled in a computer printout showing the total amount of capital employed within the State of Alabama for that year by each domestic corporation and by each foreign corporation, and the total amount of capital employed in Alabama by all domestic corporations and the total amount of capital employed in Alabama by all foreign corporations.

(d) All documents and all studies and all accumulations or compilations of information or data including without limitation any computerized date or information which may be assembled in a computer printout showing the total amount of Alabama franchise taxes paid by domestic corporations, the total amount of franchise taxes paid by foreign corporations and the percentage of the total franchise tax paid by domestic corporations and by foreign corporations.

(e) All documents and all studies and all accumulations or compilations of information or data including without limitation any computerized date or information which may be assembled in a computer printout showing the actual amount of capital for each domestic corporation who filed an Alabama domestic franchise tax return

or paid Alabama domestic franchise taxes and the total amount of that capital employed in Alabama.

V

Interrogatories

Pursuant to Rule 33, A.R.Civ.P., CSXT directs the following written interrogatories each to the Department and Commissioner to be answers separately and fully in writing under oath, in the space provided following each interrogatory:

1. State the name, address, telephone number and job position of every person participating in or providing information for response to these interrogatories or the requests for production, and the source of the information provided.

2. For each year after the enactment of Act No. 464, General Acts of Alabama 1915, levying a franchise tax on both domestic and foreign corporations identify the tax base used by Department in levying the franchise tax on foreign corporations based upon "the actual amount of capital actually employed in this state."

A. When did the tax base for foreign corporations first include surplus and undivided profits?

B. When did it first include long-term debt?

C. When did it first include related party debt?

D. When did it first include accelerated depreciation?

3. After the date of first inclusion, has each of these factors enumerated in 2 constantly remained a part of the foreign franchise tax base? If not, when was it discontinued?

4. When was "paid-up capital stock" eliminated from the statute establishing the tax base for domestic franchise taxes?

A. Since the elimination of "paid-up capital stock" as the statutory tax base for domestic franchise taxes, has the Department continued to use that standard or the "par value" of the corporation's stock as the tax base?

B. Has "par value" of the corporate stock of domestic corporations been used by the Department consistently since 1915 as the tax base upon which domestic franchise taxes are applied or calculated?

C. Does "par value" appear in the statute—Ala. Code § 40-14-40—levying Alabama franchise tax on domestic corporations?

D. Does the statute levying Alabama franchise tax on domestic corporations require the use of other than actual value of the corporate stock of domestic corporations?

E. Does the statute levying Alabama franchise tax on domestic corporations require the use of other than actual market value of the corporate stock of domestic corporations?

F. Does the statute levying Alabama franchise tax on domestic corporations require the use of other than actual book value of the corporate stock of domestic corporations?

5. Will a change in par value of capital stock of a foreign corporation have any effect on its Alabama franchise tax base or the amount of Alabama foreign franchise tax levied on it? If so, please explain.

6. Is the franchise tax base for foreign corporations increased as it—

A. Retains profits or accumulates surplus?

B. Increases indebtedness?

C. Utilizes accelerated or other method of depreciation so that its depreciation reserve exceeds depreciation computed on the basis of the useful life of its depreciable property.

7. What is the tax base utilized by Department for calculating the franchise tax imposed on domestic corporations by Ala. Code § 40-14-40?

8. What is the tax base utilized by Department for calculating the franchise tax imposed on foreign corporations by Ala. Code § 40-14-41?

9. What is the tax base utilized by Department for calculating the franchise tax imposed on domestic corporate shares tax by Ala. Code § 40-14-70, et seq?

10. Identify any legitimate purpose for imposing a disproportionate burden of Alabama franchise taxes on foreign corporations as opposed to domestic corporations.

A. Is enforcement of franchise taxes against foreign corporations easier and less expensive than against domestic corporations?

B. Do domestic corporations employ more state residents than foreign corporations?

C. Are state services utilized more by domestic corporations than by foreign corporations?

D. Are the natural resources of Alabama utilized more or less by domestic corporations than by foreign corporations?

E. Do the statutory provision for corporate dissolution of domestic corporations accrue to the benefit of the state? If so, how?

11. In connection with the domestic corporate shares tax, is the Department or State of Alabama authorized by statute to collect the tax again individual shareholders?

12. In the collection of foreign franchise taxes, can the Department or State of Alabama perfect a lien on or levy against the "capital employed in this state" of foreign corporations?

13. When was the domestic corporate shares tax first enacted in Alabama?

14. State the amount of franchise tax paid by each domestic corporation in the State of Alabama in each of the franchise tax years 1982 through 1991, inclusive, together with the aggregate par value of its capital stock, the aggregate book value of its capital stock, and the amount of domestic shares tax paid by it.

15. State the amount of franchise tax paid by each foreign corporation to the State of Alabama in each of the franchise tax years 1982 through 1991, inclusive, together with the actual value of the capital employed by it in the State of Alabama as defined in Ala. Code § 40-14-41, the aggregate par value of its capital stock and the aggregate book value of its capital stock.

STEINER, CRUM & BAKER

By /s/ Walter R. Byars
WALTER R. BYARS
Attorney for Plaintiffs

P. O. Box 668
Montgomery, AL 36101
(205) 832-8800

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

CV-90-2555-G
and consolidated cases

CSX TRANSPORTATION, INC.
Plaintiff,

v.

STATE OF ALABAMA DEPARTMENT OF REVENUE,
Defendant.

RESPONSE TO REQUEST FOR ADMISSIONS

Pursuant to Rule 36, *Alabama Rules of Civil Procedure*, the State of Alabama Department of Revenue responds to the Request For Admissions as follows:

1a. Admitted.

1b. Admitted.

2. Admitted.

3. Admitted.

4a. Admitted.

4b. Admitted.

5a. Admitted.

5b. Denied. The tax on domestic corporations is for the privilege of existing in corporate form.

6. Admitted.

7. The State admits that there is no definition of "capital employed in this State" in § 232.

8. Admitted with respect to par value stock. All stock is not "par value" stock. "No par" stock is valued for tax purposes based on the value given in exchange for the stock.

9. Admitted.

10. Admitted.

11. Admitted.

12. Admitted.

13. Admitted.

14. Admitted, except that the tax on domestic corporations is not for the privilege of doing business.

15. The State admits that the term "capital stock" is not defined.

16. Admitted with respect to par value stock.

17. Admitted.

18. Admitted.

19. Admitted, but such actions may require regulatory approval in some cases.

20. Admitted.

21. Admitted.

22. Admitted.

23. Admitted.

24. Admitted.

25. Admitted, except for no par value stock.

26. Denied.

27. Denied.

28. Admitted, except for no par value stock.

STATE OF ALABAMA)

MONTGOMERY COUNTY)

Personally appeared before the undersigned authority in and for said county and state, Ernest J. Broadhead, who after being first duly sworn, deposes on oath and says that the foregoing responses are true and correct to his best knowledge, information and belief.

/s/ Ernest J. Broadhead
ERNEST J. BROADHEAD
Affiant

[Notary Omitted]

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

CV-89-2600-G

SOUTH CENTRAL BELL TELEPHONE COMPANY

CV-90-1591-G

BELLSOUTH CORPORATION, *et al.*

CV-90-1711-G

SOUTH CENTRAL BELL TELEPHONE COMPANY

CV-91-397-G

SOUTH CENTRAL BELL TELEPHONE COMPANY

CV-91-1079-Th

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*,
Plaintiffs

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE
Defendants

CONSOLIDATED DISCOVERY—INTERROGATORIES, REQUESTS FOR PRODUCTION AND REQUESTS FOR ADMISSIONS BY TAXPAYERS

TAXPAYERS' FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION AND REQUESTS FOR ADMISSIONS TO COMMISSIONER AND DEPARTMENT

I.

DIRECTIONS FOR ANSWERING INTERROGATORIES AND PRODUCING MATERIALS AND THINGS

1. Interrogatories are to be answered under oath within the time required by law, unless the time is shortened by the Court.

2. There is a space provided between each interrogatory and it is requested that you place your answers in the space provided below each question if possible. If additional space is required, please note that additional space is required for your answer and attached the additional pages to your answers.

3. Materials to be produced for inspection and copying are to be produced at the offices of Steiner, Crum & Baker, 8th Floor, First Alabama Bank Building, 8 Commerce Street, Montgomery, Alabama 36014, within the time prescribed by law, unless the time is shortened by the Court. Alternatively, you may produce copies of the materials requested in the office of the general counsel or Chief of the Franchise Tax Division of the State of Alabama Department of Revenue or by sending the same to the offices of Steiner, Crum & Baker.

DEFINITIONS

The following are definitions of various words and phrases which are contained in the attached discovery requests for the purpose of clarifying the meaning of various words and phrases contained herein in order to assist the State of Alabama Department of Revenue and

its Commissioner to understand the objectives of these discovery efforts and to locate and furnish the relevant information and materials. An affirmative response on the part of Department or Commissioner will not be construed as an admission that any definition contained herein is either factually correct or legally binding on them.

1. DEPARTMENT means State of Alabama Department of Revenue.

2. COMMISSIONER means James M. Sizemore, Jr., as Commissioner of Revenue of the State of Alabama.

3. BELLSOUTH COMPANIES or TAXPAYERS means collectively South Central Bell Telephone Company ("South Central"), BellSouth Corporation ("BellSouth"), BellSouth Resources, Inc. ("BS Resources"), BellSouth Financial Services Corporation ("BS Financial"), BellSouth Services, Inc. ("BS Services"), BellSouth Advertising & Publishing Company ("BAPCO"), Alabama Cellular Service, Inc. ("AlaCell"), BellSouth Products, Inc. ("BS Products"), TechSouth, Inc. ("TechSouth") and Sunlink Corporation ("Sunlink"). The parenthetical abbreviation of the name of each taxpayer contained in this subsection means and designates that particular taxpayer.

4. ALA. CODE or CODE means Code of Alabama 1975, as amended.

5. CAPITAL means and refers to capital as defined in Ala. Code § 40-14-41(b).

6. DOMESTIC CORPORATION means and refers to a domestic corporation as more particularly defined in Ala. Code § 40-14-40.

7. FOREIGN CORPORATION means and refers to a foreign corporation as defined in Ala. Code § 40-14-41.

8. DOCUMENT means the original or any copy of any written, recorded, transcribed, printed, or impressed

matter of whatever kind, however produced or reproduced, including but not limited to sound pictorial recordings, word processing, electronic or computerized information, books, pamphlets, letters, memoranda, telegrams, electronic or mechanical transmissions, communications of all kinds, reports, operating statements, working papers, handwritings, charges, graphs, papers, writings, printings, transcriptions, copies, photographic reproduction, data compilations from which information can be obtained, tapes and records of all kinds.

III

Requests for Admissions

Pursuant to Rule 36 A.R.Civ.P., Taxpayers request Department and Commissioner to admit the truth of the following facts:

1. A. South Central and each and all of the other BellSouth Companies are classified as foreign corporations for the purpose of paying Alabama franchise tax pursuant to Ala. Code § 40-14-41(a).

B. For the purposes of Alabama franchise tax, South Central is and each of the BellSouth Companies is a foreign corporation by reason of its state of incorporation being other than Alabama.

2. A foreign corporation, for the purposes of Alabama franchise tax, is any corporation "organized under the laws of any state other than Alabama—organized under the laws of any other state, national or territory. . . ." Ala. Code § 40-14-41(a).

3. A domestic corporation, for the purposes of Alabama franchise tax, is any corporation organized under the laws of Alabama—"every corporation organized under the laws of this state. . . ." Ala. Code § 40-14-40.

4. A. All foreign corporations, including BellSouth Companies, are required to file its franchise tax return

and are required to pay Alabama franchise tax as a foreign corporation pursuant to Ala. Code § 40-14-41. Each foreign corporation doing business in Alabama pays franchise tax to the State of Alabama in an amount which is determined by applying the tax of $3.00 per $1,000 to the amount of capital employed in the State of Alabama by that corporation. Pursuant to statute, the amount of capital employed against which this tax rate is multiplied is the total actual value of the following items of capital employed by that foreign corporation in the State of Alabama, subject to the exclusions and deductions from the tax base as set forth in Ala. Code § 40-14-41(d) and subject to the maximum tax base for public utilities and transportation companies, such as South Central, in the value of the sum of its tangible property located in Alabama and its intangible property employed in the conduct of its business in Alabama:

(a) Outstanding capital stock;

(b) Surplus and undivided profits;

(c) Long term debt;

(d) Certain related party debts; and

(e) Accelerated depreciation.

B. The franchise tax imposed upon BellSouth Companies and other foreign corporations is based on the actual value of the capital employed in the State of Alabama, including the actual value of each of its components set forth in Ala. Code § 40-14-41:

(a) Outstanding capital stock;

(b) Surplus and undivided profits;

(c) Long term debt;

(d) Certain related party debts; and

(e) Accelerated depreciation.

Subject to the exclusions and deductions and maximum set forth in A.

5. A. The Alabama franchise tax is imposed upon foreign corporations pursuant to Ala. Code § 40-14-41 for the privilege of doing business within the State of Alabama.

B. The Alabama franchise tax is imposed upon domestic corporations pursuant to Ala. Code § 40-14-40 for the identical privilege of doing business within the State of Alabama.

6. Art. XII, § 232, Constitution of Alabama of 1901, provides for and authorizes the levy of a franchise tax on foreign corporations "based on the actual amount of capital employed in this state."

7. Art. XII, § 232, Constitution of Alabama of 1901, does not define "capital employed in this state" to include:

(a) Outstanding capital stock;

(b) Surplus and undivided profits;

(c) Long term debt;

(d) Certain related party debts; and

(e) Accelerated depreciation.

8. The Alabama franchise tax imposed upon domestic corporations pursuant to Ala. Code § 40-14-40 is computed by applying the tax rate of $10 per $1,000 to the amount of the par value of the capital stock of the corporation.

9. Art. XII, § 229, Constitution of Alabama of 1901, provides for and authorizes the levy of a franchise tax on domestic corporations "in proportion to the amount of capital stock."

10. The tax base for the Alabama domestic franchise tax does not include the actual value of its capital stock.

11. The Alabama franchise tax imposed pursuant to Ala. Code § 40-14-40 upon domestic corporations is not computed by applying the applicable tax rate multiplied by the actual value of the capital stock of the domestic corporation.

12. The tax base upon which Alabama franchise tax is imposed pursuant to Ala. Code § 40-14-40 upon domestic corporations does not include surplus and undivided profits, long-term debt, the amount of certain related party debt, or the accelerate depreciation of the domestic corporation, which are not factors in determining the amount of franchise tax to be paid by a domestic corporation.

13. The tax base of foreign corporations for the purpose of determining the amount of Alabama franchise tax to be paid by foreign corporations pursuant to Ala. Code § 40-14-42, includes items of capital not included in the franchise tax base of domestic corporations for the purpose of determining the amount of Alabama franchise tax to be paid by domestic corporations pursuant to Ala. Code § 40-14-40.

14. Capital stock upon which tax base domestic corporations pay Alabama franchise tax for the privilege of doing business in Alabama is not defined in either Art. XII, § 229, AL. CONST. or Ala. Code § 40-14-40.

15. Capital stock upon which tax base domestic corporations pay Alabama franchise tax for the privilege of doing business in Alabama is not defined in either Art. XII, § 299, AL. CONST. or Ala. Code § 40-14-40, to authorize or require the levy of the domestic franchise tax base solely upon the par value of a domestic corporation's capital stock.

16. Department and Commissioner have for the purposes of determining the franchise tax levied on a domestic corporation pursuant to Ala. Code § 40-14-40

based the levy of such tax solely upon the par value of the capital stock of each domestic corporation.

17. Department and Commissioner for the purposes of determining the franchise tax on foreign corporations, including each of the BellSouth Companies, pursuant to Ala. Code § 40-14-41 has based the levy on the full actual value of capital employed in the State of Alabama, including the outstanding capital stock, surplus and undivided profits, long-term debt, certain related party debts and accelerated depreciation of each foreign corporation.

18. The par value of shares of capital stock of a domestic corporation is a fictitious value which does not represent the actual value of the capital stock of that domestic corporation.

19. Under the corporate laws of Alabama, a corporation organized under the laws of this state may by its own action increase or decrease the "par value" of its capital stock.

20. Under the corporate laws of Alabama, a corporation organized under the laws of this state may by its own action increase or decrease the "par value" of its capital stock, without any basis, measure or yardstick for determining "par value" or the amount of "par value."

21. A domestic corporation can reduce the amount of franchise tax paid by it pursuant to Ala. Code § 40-14-40 by reducing the par value of its capital stock.

22. A foreign corporation doing business in the State of Alabama cannot reduce the amount of Alabama franchise taxes paid by it pursuant to Ala. Code § 40-14-41 by reducing the par value of its capital stock.

23. A foreign corporation doing business in the State of Alabama cannot reduce the actual amount of its capital employed in Alabama by reducing the par value of its capital stock.

24. BellSouth Companies and other foreign corporations who engage in business within Alabama are required to pay taxes on the tax base set forth in Ala. Code § 40-14-41 solely by virtue of the fact that they are organized in a state other than the State of Alabama.

25. Department and Commissioner have levied Alabama franchise taxes on domestic corporations pursuant to Ala. Code § 40-14-40 based on a tax base of the "par value" of the shares of capital stock of domestic corporations while levying the Alabama franchise tax on BellSouth Companies and other foreign corporations engaging in business within Alabama pursuant to Ala. Code § 40-14-41, based on the full actual value of capital employed in the State of Alabama by each of the foreign corporations which tax base include the full actual value of the outstanding stock, surplus and undivided profits, long-term debt, certain related party debts and accelerated depreciation subject to the exclusion and deductions set forth in § 40-14-41(d) and subject to the maximum tax base for public utilities and transportation companies, such as South Central, in the value of the sum of its tangible property located in Alabama and its intangible property employed in the conduct of its business in Alabama.

26. A. For the tax year 1991, on or before March 15, 1991, each of the following BellSouth Companies timely filed its foreign franchise tax return for 1991 and paid under protest the foreign franchise taxes calculated by it to be due for the year 1991 in accordance with the formula set forth in Ala. Code § 40-14-41, as follows:

South Central	$5,241,572.00
BSResources	4,685.77
BSFinancial	17,018.24
BSServices	205,634.69
BAPCO	71,880.77

AlaCell	64,990.00
BSProducts	2,917.00
TechSouth	3,720.25
Sunlink	38,062.33

B. Each of the copies of the franchise tax returns of each of the Taxpayers attached as Exhibit "A" to the Complaint in CV-91-1079-Th is a true and correct copy of the actual return and each check attached is a true and correct copy of the check by which the estimated payment of 1991 foreign franchise taxes paid by each of these Taxpayers was made under protest.

C. All of the statements, allegations and amounts of foreign franchise taxes paid set forth in Paragraph 7 of the Complaint for declaratory judgment and refund of taxes paid under protest in Civil Action CV-91-1079-Th, together with all exhibits attached to said complaint are true, correct and accurate.

27. A. For the tax year 1989, South Central timely filed its foreign franchise tax return for 1989, and the Department made a final assessment against South Central for 1989 foreign franchise taxes in the amount of $5,219,546 and South Central paid to the Department the amount of $5,219,546 in full payment of said final assessment before the same became delinquent and contemporaneously timely filed its Notice of Appeal.

B. Each of the Exhibits "A" through "E", inclusive, attached to the complaint in CV-89-2600-G is a true and correct copy of the items set forth and defined in the complaint.

28. A. For the tax year 1990, South Central timely filed its foreign franchise tax return and the Department entered a final assessment of foreign franchise taxes in the amount of $5,409,568.03 and South Central timely perfected its appeal and contemporaneously paid the Depart-

ment the amount of $5,411,198.31 in full payment of said final assessment plus interest before the same became delinquent.

B. The copy of Exhibit A attached to the complaint in CV-90-1711-P is a true and correct copy of the notice of appeal with an attached true and correct copy of the final assessment for 1990 foreign franchise taxes calculated by the Department to be due for the year 1991 in accordance with the formula set forth in Ala. Code § 40-14-41.

29. A. For the tax year 1990, each of the following BellSouth Companies timely filed its foreign franchise tax return for 1990 and paid under protest the foreign franchise taxes calculated by it to be be due for the year 1991 in accordance with the formula set forth in Ala. Code § 40-14-41, as follows:

BS Corp	$ 17,590.06
BSServices	205,524.69
BSFinancial	16,908.24
BAPCO	71,860.77
BSResources	4,575.77
AlaCell	45,068.83
Sunlink	37,952.33
TechSouth	3,610.25

B. Each of the copies of the franchise tax returns of each of the Taxpayers attached as Exhibit "A" to the complaint in CV-90-1591-G is a true and correct copy of the actual return and each check attached is a true and correct copy of the check by which the payment of the 1990 foreign franchise taxes paid by each of these Taxpayers were made under protest. Each of the copies attached as Exhibit "B" to the complaint in CV-90-1591-G

is a true and correct copy of the letter from the Department acknowledging receipt of each of the 1990 franchise tax payments as a payment under protest.

30. A. For each of the tax years 1986, 1987 and 1989, South Central timely filed its foreign franchise tax return and paid foreign franchise taxes calculated by it to be due for each of the years in accordance with the formula set forth in Ala. Code § 40-14-41, as follows:

Year	Amount of Tax Paid	Date Tax Paid
1986	$4,952,692.00	August 25, 1986
1987	$4,995,844.00	July 16, 1987
1988	$4,927,214.00	August 16, 1988

B. All of the statements, allegations and amounts of foreign franchise taxes paid in Paragraphs 3, 4 and 5 of the complaint and petition for judicial review in Civil Action CV-91-397-G, together with Exhibits "A", "B" and "C" attached to said complaint, are true, correct and accurate.

IV

Request for Production

Pursuant to Rule 34, A.R.Civ.P., BellSouth Companies request and move the production of the following documents and things:

1. For each of the franchise tax years 1982 through 1991—

(a) All documents and all studies and all accumulations or compilations of information or data including without limitation any computerized data or information which may be assembled in a computer printout showing for each corporation filing a domestic franchise tax return or paying domestic franchise taxes for that year, the following:

(i) The identity of the corporation (name may be withheld if identified by symbol or numeral so that the corporation later may be identified);

(ii) The aggregate par value of its capital stock;

(iii) The aggregate book value of its capital stock;

(iv) The aggregate stockholders equity, including actual value of outstanding capital stock, surplus and undivided profits;

(v) The total actual value of capital employed in Alabama as defined in Ala. Code § 40-14-41 to be the tax base upon which foreign franchise taxes were calculated or paid;

(vi) The amount of domestic franchise tax paid or due to be paid on the return as filed, as finally amended or as assessed;

(vii) The amount of corporate shares tax paid by the domestic corporation.

(b) All documents and all studies and all accumulations or compilations of information or data including without limitation any computerized data or information which may be assembled in a computer printout showing for each corporation filing a foreign franchise tax return or paying foreign franchise taxes for that year:

(i) The identity of the corporation (name may be withheld if identified by symbol or numeral so that the corporation later may be identified);

(ii) The aggregate par value of its capital stock;

(iii) The aggregate book value of its capital stock;

(iv) The aggregate stockholders equity, including actual value of outstanding capital stock, surplus and undivided profits;

(v) The total actual value of capital employed in Alabama as defined in Ala. Code § 40-14-41 to be the tax base upon which foreign franchise taxes were calculated or paid;

(vi) The amount of foreign franchise tax paid or due to be paid on the return as filed, as finally amended or as assessed.

(c) All documents and all studies and all accumulations or compilations of information and data including without limitation any computerized date or information which may be assembled in a computer printout showing the total amount of capital employed within the State of Alabama for that year by each domestic corporation and by each foreign corporation, and the total amount of capital employed in Alabama by all domestic corporations and the total amount of capital employed in Alabama by all foreign corporations.

(d) All documents and all studies and all accumulations or compilations of information or data including without limitation any computerized date or information which may be assembled in a computer printout showing the total amount of Alabama franchise taxes paid by domestic corporations, the total amount of franchise taxes paid by foreign corporations and the percentage of the total franchise tax paid by domestic corporations and by foreign corporations.

(e) All documents and all studies and all accumulations or compilations of information or data including without limitation any computerized date or information which may be assembled in a computer printout showing the actual amount of capital for each domestic corporation who filed an Alabama domestic franchise tax return or paid Alabama domestic franchise taxes and the total amount of that capital employed in Alabama.

V

Interrogatories

Pursuant to Rule 33, A.R.Civ.P., BellSouth Companies direct the following written interrogatories each to the Department and Commisioner to be answers separately and fully in writing under oath, in the space provided following each interrogatory:

1. State the name, address, telephone number and job position of every person participating in or providing information for response to these interrogatories or the requests for production, and the source of the information provided.

2. For each year after the enactment of Act No. 464, General Acts of Alabama 1915, levying a franchise tax on both domestic and foreign corporations identify the tax base used by Department in levying the franchise tax on foreign corporations based upon "the actual amount of capital actually employed in this state."

A. When did the tax base for foreign corporations first include surplus and undivided profits?

B. When did it first include long-term debt?

C. When did it first include related party debt?

D. When did it first include accelerated depreciation?

3. After the date of first inclusion, has each of these factors enumerated in 2 constantly remained a part of the foreign franchise tax base? If not, when was it discontinued?

4. When was "paid-up capital stock" eliminated from the statute establishing the tax base for domestic franchise taxes?

A. Since the elimination of "paid-up capital stock" as the statutory tax base for domestic franchise taxes, has

the Department continued to use that standard or the "par value" of the corporation's stock as the tax base?

B. Has "par value" of the corporate stock of domestic corporations been used by the Department consistently since 1915 as the tax base upon which domestic franchise taxes are applied or calculated?

C. Does "par value" appear in the statute—Ala. Code § 40-14-40—levying Alabama franchise tax on domestic corporations?

D. Does the statute levying Alabama franchise tax on domestic corporations require the use of other than actual value of the corporate stock of domestic corporations?

E. Does the statute levying Alabama franchise tax on domestic corporations require the use of other than actual market value of the corporate stock of domestic corporations?

F. Does the statute levying Alabama franchise tax on domestic corporations require the use of other than actual book value of the corporate stock of domestic corporations?

5. Will a change in par value of capital stock of a foreign corporation have any effect on its Alabama franchise tax base or the amount of Alabama foreign franchise tax levied on it? If so, please explain.

6. Is the franchise tax base for foreign corporations increased as it—

A. Retains profits or accumulates surplus?

B. Increases indebtedness?

C. Utilizes accelerated or other method of depreciation so that its depreciation reserve exceeds depreciation computed on the basis of the useful life of its depreciable property.

7. What is the tax base utilized by Department for calculating the franchise tax imposed on domestic corporations by Ala. Code § 40-14-40?

8. What is the tax base utilized by Department for calculating the franchise tax imposed on foreign corporations by Ala. Code § 40-14-41?

9. What is the tax base utilized by Department for calculating the franchise tax imposed on domestic corporate shares tax by Ala. Code § 40-14-70, et seq?

10. Identify any legitimate purpose for imposing a disproportionate burden of Alabama franchise taxes on foreign corporations as opposed to domestic corporations.

A. Is enforcement of franchise taxes against foreign corporations easier and less expensive than against domestic corporations?

B. Do domestic corporations employ more state residents than foreign corporations?

C. Are state services utilized more by domestic corporations than by foreign corporations?

D. Are the natural resources of Alabama utilized more or less by domestic corporations than by foreign corporations?

E. Do the statutory provision for corporate dissolution of domestic corporations accrue to the benefit of the state? If so, how?

11. In connection with the domestic corporate shares tax, is the Department or State of Alabama authorized by statute to collect the tax again individual shareholders?

12. In the collection of foreign franchise taxes, can the Department or State of Alabama perfect a lien on or levy against the "capital employed in this state" of foreign corporations?

13. When was the domestic corporate shares tax first enacted in Alabama?

14. State the amount of franchise tax paid by each domestic corporation in the State of Alabama in each of the franchise tax years 1982 through 1991, inclusive, together with the aggregate par value of its capital stock, the aggregate book value of its capital stock, and the amount of domestic shares tax paid by it.

15. State the amount of franchise tax paid by each foreign corporation to the State of Alabama in each of the franchise tax years 1982 through 1991, inclusive, together with the actual value of the capital employed by it in the State of Alabama as defined in Ala. Code § 40-14-41, the aggregate par value of its capital stock and the aggregate book value of its capital stock.

STEINER, CRUM & BAKER

By /s/ Walter R. Byars
WALTER R. BYARS
Attorney for Plaintiffs

P. O. Box 668
Montgomery, AL 36101
(205) 832-8800

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

CV-89-2600-G
and consolidated cases

SOUTH CENTRAL BELL TELEPHONE COMPANY,
Plaintiff,

v.

STATE OF ALABAMA DEPARTMENT OF REVENUE,
Defendant.

RESPONSE TO REQUEST FOR ADMISSIONS

Pursuant to Rule 36, *Alabama Rules of Civil Procedure*, the State of Alabama Department of Revenue responds to the Request For Admissions as follows:

1a. Admitted.

1b. Admitted.

2. Admitted.

3. Admitted.

4a. Admitted.

4b. Admitted.

5a. Admitted.

5b. Denied. The tax on domestic corporations is for the privilege of existing in corporate form.

6. Admitted.

7. The State admits that there is no definition of "capital employed in this State" in § 232.

8. Admitted with respect to par value stock. All stock is not "par value" stock. "No par" stock is valued for tax purposes based on the value given in exchange for the stock.

9. Admitted.

10. Admitted.

11. Admitted.

12. Admitted.

13. Admitted.

14. Admitted, except that the tax on domestic corporations is not for the privilege of doing business.

15. The State admits that the term "capital stock" is not defined.

16. Admitted with respect to par value stock.

17. Admitted.

18. Admitted.

19. Admitted, but such actions may require regulatory approval in some cases.

20. Admitted.

21. Admitted.

22. Admitted.

23. Admitted.

24. Admitted.

25. Admitted, except for no par value stock.

26a. Admitted.

26b. Admitted.

27a. Admitted.

27b. Admitted.

28a. Admitted.

28b. Admitted.

29a. Admitted.

29b. Admitted.

30a. Admitted.

30b. Admitted.

STATE OF ALABAMA)

MONTGOMERY COUNTY)

Personally appeared before the undersigned authority in and for said county and state, Ernest J. Broadhead, who after being first duly sworn, deposes on oath and says that the foregoing responses are true and correct to his best knowledge, information and belief.

/s/ Ernest J. Broadhead
Affiant

[Notary Omitted]

[Pl. Trial Exh. 7]

COMPARISON OF FRANCHISE TAX COLLECTIONS

Calendar Year	Domestic Collections	Foreign Collections	Total Collections
1982	4,956,227	47,024,411	51,980,638
1983	5,041,752	46,956,727	51,998,479
1984	14,670,297	49,600,363	64,270,660
1985	14,005,122	55,498,564	69,503,686
1986	13,254,708	61,771,027	75,025,734
1987	13,055,604	71,970,979	85,026,583
1988	12,608,317	69,000,222	81,608,540
1989	12,652,895	67,439,404	80,092,299
1990	12,424,154	84,250,744	96,674,898
1991	12,245,463	96,290,249	108,535,712
1992	12,596,834	107,612,319	120,209,153

FRANCHISE TAX ACTIVE ACCOUNTS

Calendar Year	Domestic Accounts	Foreign Accounts	Total Accounts
1982	39,799	14,292	54,091
1983	41,899	14,480	56,379
1984	45,099	14,926	60,025
1985	46,178	15,059	61,237
1986	45,208	13,394	58,602
1987	47,111	13,627	60,738
1988	52,841	14,722	67,563
1989	57,628	14,845	72,473
1990	58,527	16,881	75,408
1991	57,211	17,888	75,099
1992	55,579	17,068	72,647

[Pl. Trial Exh. 8]

COMPARISON OF FRANCHISE TAX COLLECTIONS

Fiscal Year	Domestic Collections	Foreign Collections	Total Collections
1979	4,769,827	34,973,891	39,743,718
1980	4,866,324	39,003,401	43,869,725
1981	5,048,643	44,376,222	49,424,865
1982	4,970,474	48,635,047	53,605,521
1983	5,033,277	48,328,529	53,361,806
1984	14,606,245	49,160,353	63,766,598
1985	13,976,379	58,558,109	72,534,488
1986	13,363,250	60,315,840	73,679,090
1987	13,023,273	74,470,832	87,494,105
1988	12,686,153	70,569,055	83,255,208
1989	12,670,488	62,400,724	75,071,212
1990	12,363,098	87,596,290	99,959,388
1991	12,247,206	95,661,379	107,908,585
1992	12,536,527	109,547,939	122,084,466

FRANCHISE TAX ACTIVE ACCOUNTS

Fiscal Year	Domestic Accounts	Foreign Accounts	Total Accounts
1979	35,894	9,419	45,313
1980	36,417	9,803	46,220
1981	37,900	10,582	48,482
1982	38,772	11,234	50,006
1983	39,721	11,497	51,218
1984	40,998	11,954	52,952
1985	42,285	12,718	55,003
1986	47,163	12,776	59,939
1987	48,950	12,913	61,863
1988	52,119	13,878	65,997
1989	56,613	14,640	71,253
1990	60,515	15,566	76,081
1991	55,921	17,629	73,550
1992	52,904	17,951	70,855